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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-352

WILLIAMS PIPE LINE COMPANY AND
EXPLORER PIPELINE COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
FARMERS UNION CENTRAL EXCHANGE, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Williams Pipe Line Company (Williams), and Explorer Pipeline Company (Explorer), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 27, 1978 in proceedings styled *Farmers Union Central Exchange* v. *Federal Energy Regulatory Commission and the United States of America*, No. 76-2138. Both Williams and Explorer are oil pipeline common carriers and both were intervenors in the proceedings before the Court of Appeals.

OPINIONS BELOW

A panel of the United States Court of Appeals for the District of Columbia Circuit has concluded to remand to

the Federal Energy Regulatory Commission (FERC) proceedings litigated before and decided by the Interstate Commerce Commission (ICC) in *Petroleum Products, Williams Bros. Pipe Line Co.*, 351 I.C.C. 102 (1975), and 355 I.C.C. 479 (1976). A copy of the Circuit Court decision is included as Appendix A in the separately bound appendix submitted herewith. Copies of the two opinions of the ICC are set forth in Appendices B and C, and the Initial Decision of the Administrative Law Judge is included as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254 and 2350. The decision of the Court of Appeals was entered June 27, 1978, and this petition has been filed within 90 days of said date. A petition of Explorer for rehearing with respect to certain issues was denied on July 25, 1978 (Appendix G) and issuance of the mandate has been stayed until September 1, 1978 by order of the Court of Appeals dated August 4, 1978 (Appendix H).

QUESTIONS PRESENTED

1. Did the Court of Appeals act contrary to the Department of Energy Organization Act[1] in remanding to FERC for *de novo* consideration proceedings decided by the ICC with administrative finality prior to the creation of FERC?
2. Did the Court of Appeals, by acquiescing in FERC's request for remand, substitute *de novo* consideration by a newly created administrative agency for the judicial review to which the parties were entitled as a matter of law?

[1] 42 U.S.C. §§7101 *et seq.*

3. Did the Court of Appeals, by refusing to accept the ICC's determination as to how it would deal with industry-wide issues, improperly substitute its judgment for that of the Commission, thereby denying agencies the latitude to use rulemaking proceedings for determining matters impacting on all members of a regulated industry?

STATUTES INVOLVED

The statutory provisions directly involved are several Sections of Part I of the Interstate Commerce Act (49 U.S.C. §§1-27), the Administrative Procedure Act (5 U.S.C. §551 *et seq.*), and the Department of Energy Organization Act (DOE Act), 42 U.S.C. §§7101-7352. These provisions are set forth in the Statutory Appendix included in the separately bound appendix filed with this petition.

STATEMENT OF THE CASE

A. Introduction

This case involves judicial review of decisions of the ICC with respect to the lawfulness of certain rates of Williams and initial joint rates of Williams and Explorer. Apart from recent proceedings involving the Trans Alaska Pipeline System,[2] this is the first major case involving judicial review of an oil pipeline rate decision. Subsequent to the ICC decisions, and to the filing of the petition for review, the oil pipeline regulatory jurisdiction of the ICC was transferred to FERC. Accordingly, this case also involves questions concerning the consequences of that transfer.

[2] *Trans Alaska Pipeline Rate Cases*, U.S. , 46 U.S.L.W. 4587 (June 6, 1978).

Williams is a major pipeline common carrier of petroleum products operating in ten midwestern states ranging from Oklahoma, on the south, to North Dakota and Minnesota, on the north, Unlike almost all oil pipelines, it is not owned by any member of the oil industry. Williams became a petroleum products common carrier in March, 1966, when it purchased the physical assets of Great Lakes Pipe Line Company (Great Lakes). Explorer is a newly constructed pipeline, not affiliated with Williams, built to transport petroleum products from origins on the Gulf Coast to destinations in the Midwest. It first commenced operations on a limited basis in the fall of 1971, and shortly thereafter was able to undertake joint line movements with Williams. The lines of Williams and Explorer physically connect at West Tulsa, Oklahoma.

B. Proceedings Before the Commission

Involved before the ICC were increased rates of Williams published at various dates late in 1971 and early in 1972 which, taken together, constituted a general rate increase. Also involved were initial joint rates of Williams and Explorer published December 28, 1971 from the Gulf Coast origins served by Explorer to 45 midwest destinations served by Williams.

The rate increases of Williams and the initial joint rates of Williams and Explorer were separately protested on quite different grounds by the petitioners below.[3] The rates became effective in ordinary course, however, the ICC denying suspension pending investigation (App. D-5). The Shipper Group also attempted to challenge the same rates before the United States District Court for the District of Kansas, but the District Court dismissed the action on jurisdictional grounds. *American Petrofina Co. of*

[3] Referred to by the ICC, and sometimes herein, as the "Shipper Group."

Texas v. *Williams Bros. Pipeline Co.*, 56 F.R.D. 488 (D. Kan. 1972). Thereupon, the Shipper Group filed a formal complaint challenging the local rates of Williams from August 23, 1970,[4] and the joint rates of Williams and Explorer (App. D-5).

The proceedings were referred to an Administrative Law Judge for hearings. The hearings extended over some twenty hearing days at which sixteen witnesses presented direct testimony and were cross-examined, and, together with exhibits and written submissions, produced a record of many thousands of pages. The Administrative Law Judge rendered his initial decision on June 6, 1974 approving the contested rates in all respects (App. D).

The decision of the Administrative Law Judge was reviewed by Division 2 of the Commission. Based on the record and additional written argument by the parties, the Division fully affirmed the Administrative Law Judge's decision in a written opinion (351 I.C.C. 102, Nov. 5, 1975; App. B). Thereafter, the full Commission, upon reconsideration on its own motion of the Division 2 decision and upon further written submissions of the parties, affirmed the Division 2 decision (355 I.C.C. 479, Dec. 21, 1976; App. C).

Williams justified its rates on numerous grounds. However, in reaching its decision, the ICC relied on only one of these, that Williams' earnings under the involved rates were well below the generally applicable industry standard. In making this finding that Williams' rates and earnings were reasonable, the ICC applied to Williams the standard of reasonableness for petroleum products pipelines that it had first articulated in 1941 in a case in which Great Lakes Pipe Line Company, Williams' predecessor,

[4] The Court of Appeals erroneously assumes that rates only as far back as 1972 are in issue (App. A-26).

had been a respondent/defendant. *Petroleum Rail Shippers Assoc. v. Alton & Southern R.R.*, 243 I.C.C. 589 (1941).[5] By that standard, rates were deemed reasonable if they produced no more than a 10% return on the valuation of the carrier's properties as determined by the ICC under Section 19a of the Interstate Commerce Act.[6] In applying that standard to Williams, the ICC rejected the arguments of the Shipper Group that a new standard should be imposed upon Williams, one never theretofore applied to any oil pipeline carrier, whereby rate levels would be set using a depreciated original cost rate base ("original cost" meaning the cost when the property was first dedicated to public use).

For Williams, this argument held particular significance since it had paid a price for the properties of Great Lakes at arms-length which, while consistent with the then current physical value of those properties, was substantially higher than Great Lakes' depreciated original cost (App. A-4, 18). The Commission accepted Williams' argument that to adopt such an approach in this particular case would have been grossly unfair, particularly where Williams had purchased the Great Lakes properties under a known and well-defined regulatory framework that had been in existence for twenty five years.

However, the ICC did not ignore that its regulatory standard for pipeline rates was itself being chailenged.

[5] While the Court of Appeals appears critical of reference to such a standard as "traditional" or "customary" because of the limited formal decisions in which it has been used, its existence and acceptance by the industry and the ICC cannot be denied. Review of such a standard was one purpose of the rule making proceeding referred to by the ICC in its decision (App. C-9), 13), and the ICC also used the standard as a guide in setting interim rates for the Trans Alaska Pipe Line System, an action affirmed by this Court. *Trans Alaska Pipeline Rate Cases*, U.S. , 46 U.S.L.W. 4587, 4588 n. 13 (June 6, 1978); *Trans Alaska Pipeline System*, 355 I.C.C. 80, 85 (1977).

[6] 49 U.S.C. §19a; App. SA-7 to SA-13.

Thus, while deciding to measure Williams' rates by the existing standard, the ICC at the same time concluded to treat the industry-wide issues raised by the Shipper Group's attack on that standard in a separate rule-making proceeding of general applicability (*Valuation of Oil Pipelines*, Ex Parte 308). This proceeding is still being actively conducted by FERC in its Docket No. RM78-2.

With respect to the initial joint rates, the ICC found in each of the three administrative decisions that the Shipper Group had failed to meets its burden of proof.

C. Proceedings Before the Court of Appeals

The petition for review was filed with the Court of Appeals December 21, 1976. Following the creation of FERC on October 1, 1977, that agency moved the court to remand the record to it "so that it can consider the issues presented and be free to issue any subsequent orders." Williams and Explorer opposed that motion, claiming it to be a direct violation of the DOE Act and an abuse of FERC's administrative discretion. By order dated November 21, 1977, FERC's motion was denied by the Court of Appeals. Consequently in the Court of Appeals, not only the private parties, but also FERC and the ICC lined up on opposite sides. The ICC supported its decisions. However, the Department of Justice, speaking for the statutory defendant, the United States, confessed error as to the local rates (but took no position as to the joint rates) and also urged remand to FERC.[7]

[7] The Department of Justice plainly considers the issues to be of national significance. As Assistant Attorney General Shenefield recently indicated, the Department is using its position as spokesman for the United States in this case to advance its objective of reducing the market value of *all* oil pipelines in anticipation of achieving mandatory divestiture of pipeline ownership by the oil industry (App. F). Even assuming that such an objective is appropriate, there is no reason why

On June 27, 1978 the Court of Appeals issued its decision remanding the proceedings to FERC on all but one issue, that of claimed discrimination under Section 2 of the Interstate Commerce Act. In its decision, the Court of Appeals was critical of the "return on valuation" standard that the ICC had used in evaluating the reasonableness of Williams' rates, devoting a large part of its decision to the expression of its views against the use of a valuation rate base in any ratemaking proceeding.[8] Recognizing that there appeared to be factual as well as legal reasons whereby any new ratemaking standard should not be applied retroactively to Williams, the Court of Appeals nevertheless declined to endorse the manner in which the ICC took such factors into account, i.e., by dealing with the future status of the standard in a separate rulemaking proceeding.

Moreover, despite specific language of the Department of Energy Organization Act that existing cases were to be dealt with "as if this chapter had not been enacted",[9] the Court concluded that the transfer of regulatory authority from the ICC to FERC "has deprived us of even the possibility of endorsing ICC's attempt to develop" its own approach to its regulatory tasks (App. A-16). On this basis, the Circuit Court declined even to consider the propriety of the ICC's judgment in this

it cannot be pursued by the Department in the pending FERC rulemaking case, and, in fact, it is. Affirmance of the ICC's exercise of its discretion under the unique facts of this case can in no way limit FERC's discretion to consider prospective changes in the pipeline ratemaking standard advocated by the Department of Justice or anyone else.

[8] The Court's discomfort is not shared by Congress. Although the Court of Appeals criticized the Commission's use of a valuation base for pipelines as being inconsistent with changed ratemaking standards for railroads, the House of Representatives explicitly approved the continued use of valuation as the rate base for oil pipelines, while modifying the ratemaking procedure for railroads. H.R. Rep. No. 93-1381, 93d Cong., 2d Sess. 26 n.1 (1974).

[9] 42 U.S.C. §7295(c)

regard. Instead, and notwithstanding the still pending rule making proceeding started by the ICC and continued by FERC, it offered its critique of the ICC's "traditional" standard, and proceeded to grant FERC's request for a remand so that it might "begin its regulatory duties in this area with a clean slate" (App. A-19, 25).

As to the joint rates the Court declined to review the ICC's decision that the Shipper Group had failed to sustain its burden of proof. It reached this conclusion in part at least because the FERC might, on remand, change Williams' local rates and thereby affect, because of the resulting change in the rate relationship, the question as to the lawfulness of the joint rates (App. A-27, 28).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision directly contradicts provisions of the recently enacted DOE Act governing the transfer of regulatory authority over oil pipelines from the ICC to FERC. That legislation specifically calls for effectuation of that transfer with no substantive impact on pending proceedings. Yet, in spite of that plain language in the Act, FERC sought remand of these proceedings decided by the ICC in 1976 involving pipeline rates as far back as 1970, and also despite such language the Court of Appeals consented to FERC's request for retroactive jurisdiction. This interpretation of the Act necessarily impacts not only on any pending proceedings before FERC involving other pipelines, but necessarily casts doubt on the rates of all oil pipelines, not merely for the future (where FERC has acknowledged jurisdiction) but for the past as well.[10] By granting FERC the author-

[10] See 49 U.S.C. §§13(1), 16(1), 16(3)(b), which permit the filing of complaints seeking reparations with respect to shipments as far back as two years prior to the filing date.

ity to act as a "Monday morning quarterback" as to *past* pipeline rates, the Court of Appeals has virtually guaranteed the fulfillment of its own prophecy that the present case, although the first "judicial foray into the area of oil pipeline ratemaking," is "almost assuredly" not the last (App. A-17, n. 24). By permitting retroactive application of whatever changes in policy this new agency may develop, the Court of Appeals' decision has major consequences for an entire industry.

Second, the Court's decision raises serious questions of the relative roles of agency and reviewing court, questions on which this Court only recently had occasion to instruct this same Court of Appeals. *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, U.S. , 46 U.S.L.W. 4301 (April 3, 1978). In its *Vermont Yankee* opinion this Court noted the particular significance of decisions of the Court of Appeals for the District of Columbia Circuit in the field of administrative law. *Vermont Yankee, supra*, 46 U.S.L.W. at 4305 n.14. Just as in that case, the Court of Appeals in the present case has seriously misperceived the proper scope of its function. That misperception is found not only in its refusal even to consider the propriety of ICC's approach to its regulatory responsibility and in its freely proffered advice on economics and the use of a valuation rate base, but also in particularly revealing statements in its opinion.

Thus, the Court of Appeals stated that apart from the provisions of the Interstate Commerce Act," . . . we [the Court of Appeals] have little to rely on in constructing a theory of oil pipeline ratemaking" (App. A-9). Similarly, at a later point in its opinion, the Court of Appeals decried its ability under current circumstances to make a "reasonableness" determination with respect to Williams' rates even were it to look at the record (App. A-25). Ratemaking theories and reasonableness determinations are

not for the Court of Appeals to make: they are the function of the agency, in this case the ICC. That agency's conclusions are not to be overturned merely because the reviewing Court might, if it had the regulatory responsibility, deal otherwise with the matter. *Vermont Yankee, supra*, 46 U.S.L.W. at 4311; *Consolo* v. *Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966); *American Commercial Lines, Inc.* v. *Louisville & N.R.Co.*, 392 U.S.571, 590-593 (1968).

Agency proceedings are not intended to go on indefinitely, to be reopened for reconsideration or rehearing with each changed circumstance. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944). If such were the case, administrative proceedings would never end. Yet the Court of Appeals would send this case back as though the litigation of several years, and the two ICC decisions had never occurred.

Having misconceived its role, the Court of Appeals brushed aside the ICC's exercise of discretion in choosing how to deal with industry-wide issues, advanced its own views as to the current applicability of the existing regulatory standard and ordered the case remanded to FERC, the ICC's successor-agency, for a decision *de novo*.

The decision thus has important national significance in terms of FERC's jurisdiction over past, as contrasted with future, oil pipeline rates, and in terms of judicial review of administrative decisions generally. As to the latter, even though FERC sought the unlimited remand granted by the Court of Appeals, a decision overruling the ICC's use of its regulatory discretion is bound to restrict the scope of discretion of all agencies—including FERC—in their use of rulemaking as a means of adopting industry-wide criteria.

I. BY ACQUIESCING IN FERC'S REMAND REQUEST, THE COURT OF APPEALS PERMITTED A RETROACTIVE EXTENSION OF FERC'S JURISDICTION CONTRARY TO THE EXPRESS PROVISIONS OF THE DOE ACT.

Although the Court of Appeals found what it described as "blemishes" in the ICC's decision, it stated that what "clinches our decision to remand on the reasonableness issue" was FERC's request for such a remand "so that it may begin its regulatory duties in this area with a clean slate" (App. A-28).[11] The DOE Act contemplates no such relitigation by FERC of a case long since fully tried and administratively decided. To the contrary, the legislative history of the Act, as well as its language, plainly demonstrate that Congress intended no substantive changes to occur as a consequence of the transfer.

The DOE Act speaks in no uncertain terms. The Act states specifically that its provisions are not to affect suits commenced prior to the effective date, a category clearly encompassing this case, and in such suits judgments are to be "rendered in the same manner and effect as if this chapter had not been enacted."[12]

These words mean what they say. Any suggestion to the contrary is refuted by the legislative history which shows that Congress thought it was accomplishing the jurisdictional shift without producing substantive con-

[11] How redeciding this case is deemed necessary to clean FERC's slate is unclear, and the Court of Appeals' decision does not illumine the point. FERC's authority to deal with future rates of the industry cannot fairly be said to be affected by this case with its most unique set of facts. In fact, FERC is proceeding with an industry-wide rulemaking case with no apparent inhibitions, a course of action inconsistent with a "clean slate" plea. In any event, the DOE Act contains no provision warranting use of such a claim as a basis for deciding once again cases already finally decided by the ICC.

[12] 42 U.S.C. §7295(c).

sequences for litigation in process. The Conference Committee stated:

> "Judicial review of final agency action taken by the Commission or proceedings now under way which are transferred from the ICC, as well as new proceedings initiated by the Commission, will continue to be made in the same manner as if the functions had been retained in the ICC." Sen. Rep. No. 95-367, 95th Cong., 1st Sess., Conf. Report to Accompany S. 826, July 27, 1977, at p. 79.

The same intent was evidenced in the Report of the Committee on Government Operations of the House of Representatives, which stated:

> "However, the provisions of this Act shall not affect judicial proceedings commenced prior to the effective date of this Act." H.R. Rep. No. 95-346 Part I, 95th Cong. 1st Sess. to Accompany H.R. 6804, May 16, 1977, at p. 32.

In its report on the bill, the Senate Committee on Governmental Affairs spoke with approval concerning the ICC's regulation of oil pipelines and the significance of regulatory continuity, in the following terms:

> "Section 306 transfers functions related to the transportation of oil by pipeline as set forth in the Interstate Commerce Act and vested by law in the ICC or the Chairman and members thereof. While the processes and procedures of the ICC, including annual valuations and review, have in the past provided a stable regulatory framework, the committee agrees that the transfer would facilitate decisionmaking with regard to the transportation of this important energy resource. Recognizing the importance of regulatory continuity, the committee proposes no

substantive changes in the existing method of regulation under the Interstate Commerce Act." Sen. Rep. No. 95-164, 95th Cong., 1st Sess. Report of Comm. on Gov. Affairs, at p. 35.

To the same effect is a reported colloquy between Senator Ribicoff, the floor manager of the legislation when the Conference Report was before the Senate, and Senator Hansen, as follows:

"MR. HANSEN. Finally Mr. Chairman, I am greatly concerned that we are placing responsibilities and authorities in this Commission for which there will not be initially a full capability to discharge them, because much of the expertise, background analyses, and understanding of this oil pipeline regulation[s] will necessarily remain at the ICC. Would the Senator agree that the ICC and its staff should provide the assistance that the Commission may require and request, on a reimbursable basis and pursuant to such agreement as the two Commissions may enter into, as necessary to insure that during the transition period the new Commission has available all of the requisite expertise, background files and analyses, investigatory capability, legal support and other assistance from the ICC that the new Commission needs to assure continuity and consistency in the administration of the transferred function?

MR. RIBICOFF. I agree with the Senator completely. Certainly, it is our clear intention that the transferred ICC regulatory functions, as well as all other, will be fully and competently exercised by the new Commission with a maximum degree of continuity and consistency.

MR. HANSEN. I sincerely thank the distinguished Senator for his remarks and I want to express my great pleasure in having this opportunity to work closely with the Senator from Connecticut in fashioning this legislative history on this issue. I would hope that this colloquy will provide clear guidance for the establishment of the Department and the new Commission, and for any reviewing court, regarding the intent of this report for the future regulation of the transportation of oil by pipeline." (Cong. Rec., S 13283, Aug. 2, 1977).

Congress intended "continuity and consistency" in the regulation of this industry as an intended part of the jurisdictional shift. It did not intend that the shift would be used by the new agency (FERC) as a reason for redeciding cases tried by its predecessor. Nor did it intend, with respect to the joint rates and the complaint case, that the Shipper Group that failed to meet its burden of proof would be given a second opportunity to meet that burden merely because a new agency now had the regulatory responsibility. It may very well be that FERC will have different ideas than the ICC as to how best to perform its obligations. But that fact of human nature was not intended by Congress to be an excuse for retroactive imposition of FERC's views. There is no warrant whatsoever for the use of FERC's creation as a reason for permitting it to decide an old case all over again. To the contrary, the Court of Appeals' reliance on FERC's "clean slate" request violates the statutory intent.

The Court of Appeals was also wrong in concluding that the transfer of jurisdiction out of the ICC in some way barred the Court from affirming that agency's regulatory approach (App. A-16). Again, as noted above the statute and its legislative history are directly to the contrary.

The language used by Congress in §7295(c) of the DOE Act with respect to pending suits is virtually identi-

cal to the language it used in the Communications Act of 1934, when certain regulatory authority of the ICC, the former Federal Radio Commission and the Postmaster General was transferred to the newly formed Federal Communications Commission.[13] It would appear that Congressional draftsmen consider such language sufficient to accomplish the purposes that the legislative history of the DOE Act indicates were intended. The Court of Appeals' decision in this case would thwart those purposes. Congress is entitled to be told what it must do to assure itself that only the substantive changes it intends, and no more, will accompany adoption of statutes rearranging jurisdiction among federal agencies.

II. BY ITS DECISION, THE COURT OF APPEALS HAS DEPRIVED WILLIAMS AND EXPLORER OF THE JUDICIAL REVIEW TO WHICH THEY ARE ENTITLED.

The Court of Appeals refused even to consider the ICC's decision in terms of what it actually was—a decision to decide a specific case using its existing industry standard coupled with review of that standard in a rulemaking proceeding. Williams' and Explorer's rates were challenged before and considered by the ICC long before FERC was even proposed. The ICC's decisions finding those rates lawful were and are subject to review under well accepted standards. Those standards were not changed one iota by the DOE Act, and there is no support for a conclusion that parties to pending review cases were intended to be penalized by the transfer to FERC. The Court of Appeals refused to review the ICC's decision on the merits, either as to the propriety of its regulatory approach or as to whether its conclusion had record support (App. A-16, 25). Had it done either, it could only have affirmed the ICC.

[13] 47 U.S.C. §604(d).

Williams and Explorer are entitled to have the ICC's decisions sustaining their rates judged in accordance with the legislative intent, in a way that does not prejudice them because the DOE Act was passed. By acceding to FERC's remand request, the Court of Appeals deprived Williams and Explorer of that right, and improperly continued the cloud over the revenues of those companies that has already lasted for some eight years.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE APPROPRIATE FUNCTIONS OF AGENCY AND JUDICIARY IN ADMINISTRATIVE CASES.

That the scope of judicial review of the decisions of administrative agencies is limited cannot be denied, and this fact is purportedly recognized by the Court of Appeals (App. A-25). Nor can it be denied that this general proposition has direct application to decisions of the ICC in rate cases. *Atchison T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 805 (1973). Moreover, it is also clear that regulatory agencies are entitled to wide latitude in deciding how they will deal with their regulatory responsibilities, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and that this latitude extends to decisions on whether to deal with industry-wide issues in rulemaking or in adjudicatory proceedings. *American Commercial Lines, Inc. v. Louisville & N.R. Co.*, 392 U.S. 571 (1968). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-295 (1974); *SEC* v. *Chenery*, 332 U.S. 194, 201 (1947). Administrative decisions are to be overturned only for "substantial procedural or substantive reasons as mandated by statute." *Vermont Yankee* case *supra*, 46 U.S.L.W. at 4311.

In the present case, the Court of Appeals never dealt with the real issue before it, the propriety of the overall regulatory approach decided upon by the I.C.C., concluding (erroneously) that it could not effectively do so because of the transfer of ICC's oil pipeline duties to

FERC. The Court of Appeals therefore never found the ICC's action arbitrary or capricious, or unsupported by the record, stating only that it was "not persuaded" by the ICC's finding[14] that "consistency and fairness" required the approach used (App. A-20). That the Court of Appeals might have reached a different conclusion than the ICC on how to deal with the issues is irrelevant.

It is not only significant but also ironic that the same Court that was "not persuaded" by the ICC's conclusion as to what considerations of consistency and fairness require appeared to endorse in substance the result reached by the ICC. The Court of Appeals recognized the unfairness that would result from changing regulatory standards retroactively, particularly under the unique circumstances of this case where Williams had paid a substantial price to acquire its pipeline under a long-standing regulatory approach. The Court stated (App. A-20):

> "And, to the extent that Williams, having nothing else to depend on but the earlier cases, justifiably relied on them in adopting its rates, see *id.*, the solution is not to perpetuate that reliance but to end it *prospectively* without allowing reparations based on its occurrence in the past." (emphasis added)

The Court of Appeals, like the ICC, was thus contemplating regulatory change, if at all, on a prospective basis. This forward-looking thrust to the Court's own opinion, therefore, lends implicit support to the judgment of the agency whose decision the Court declined to affirm.[15] The ICC's findings as to what consistency and fairness required are patently proper and consistent with the Court of Appeals' own view of the case.

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[14] App. C-9; 355 I.C.C. at 484.

[15] Elsewhere the Court of Appeals also suggested that Williams may be protected, as a matter of law, from any possible reparations order under the circumstances of this case, further indicating its view that the remand proceedings would be prospective only in their impact (App. A-29)

Williams and Explorer heartily agree that any change in the existing standard should be prospective only. In those terms, however, this case is essentially moot, both the local rates and the joint rates involved in this case having been superseded on many occasions. The local rates of Williams were last changed September 25, 1977 without suspension or investigation (Appendix E), and the current joint rates became effective March 8, 1978 without protest. Accordingly the rates and rate relationships under investigation by the ICC no longer exist. Such changes moot the issue as to the lawfulness of the joint rates for the additional reason that the Shipper Group presented no evidence of damage resulting from their claim of a §3(1) violation.

That a regulatory agency has the latitude to perform its duties in the manner adopted by the ICC here was directly decided by this Court in *American Commercial Lines, Inc. v. Louisville & N. R. Co.*, 392 U.S. 571, 590-592 (1968). There, as here, the ICC chose to pass on proposed rates using its traditional criteria while considering possible changes in those criteria in a rulemaking case. The three-judge District Court overruled the Commission but this Court reversed, finding that the ICC had acted within its proper discretion. The case is directly in point and requires affirmance of the ICC actions in the present case.

Nor does the ICC's conclusion to give separate consideration to its standard in a rulemaking case provide warrant for the Court of Appeals' exposition of its views as to the current efficacy of that standard. Such views as to the propriety of the use of a "fair value" rate base, current economic conditions in the pipeline industry, and the present adequacy of the traditional return on valuation standard are matters properly to be addressed by the agency as it intended—in the rule-making case established for that purpose. The Court's expansive views on these matters are subject to the same criticism that this

Court applied to the three-judge District Court in the *American Commercial Lines* case, *supra*. The District Court had also chosen to tell the ICC how it felt the agency's standards should be changed. This Court chided the lower court for effectively "mooting" the rule-making proceeding before it started (*American Commercial Lines*, *supra*, 392 U.S. at 591). The decision of the Court of Appeals can be characterized in the same terms.[16]

Under the Court of Appeals' approach the authority of an administrative agency to set standards for rate regulation in broad-based quasi-legislative proceedings would be severely undermined. No determination of the lawfulness of rates based on industry-wide standards would hereafter be safe in any proceeding instituted to challenge effective, new or increased rates absent at least some evidence justifying anew the established standards. The public interest benefits of having accepted standards, consistently applied would be lost, as would the benefits to regulated industry of knowing how the reasonableness of its rates would be measured so long as a given standard remained unchanged.

The incorrect concept of the Court of Appeals of its review function is further evidenced by its refusal to do what it agrees would normally be done, i.e. look beyond the ICC decisions to the record itself (App. A-25).[17] The

[16] The Court of Appeals' criticism of the continued use of a valuation rate base would also turn the *Hope* case (*FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)), inside out, by converting a decision endorsing agency discretion as to rate base to one forbidding use of a particular type. The Court of Appeals would also effectively repeal §19a of the Interstate Commerce Act (49 U.S.C. §19a) by placing the use of valuations under that section for ratemaking purposes beyond the agency's discretion.

[17] Notwithstanding this stated refusal to look at the record, the Court indulged in selective record-dipping in its criticism of the ICC's pipeline ratemaking standard and its depreciation expense finding (A-22 to A-25). In both instances, the full record on the particular point was not reviewed.

Court's refusal to do so here was stated to be because of what it characterized as a "lack of viable precedents" in the area of pipeline ratemaking. This statement is consistent with the Court of Appeals' obvious view that the return on valuation standard was being tried, when the issue before the Court was the lawfulness of the ICC's *pro tempore* use of that standard under the circumstances of this case. Since that conclusion of the ICC was in turn based on considerations of "consistency and fairness," which the Court does not claim to be inappropriate, the record need only be searched for supporting evidence for those findings—not a difficult task.

The Court of Appeals' decision would improperly deprive the ICC, FERC, or any other agency of the right to use industry-wide standards in deciding individual cases. It would also deprive regulated companies of the right to rely on those standards until changed.

CONCLUSION

The Court of Appeals' decision directly violated the mandate of the DOE Act, and the plain Congressional intent, that pending cases are not to be substantively affected by the transfer to FERC of ICC's oil pipeline responsibilities. As a consequence, Williams and Explorer have been deprived of their right to have the ICC's decisions reviewed on the merits.

Moreoever, while the Court's decision has adversely affected Williams and Explorer, it has done much more. The decision has cast doubt upon the propriety of all oil pipeline rates published in reliance on the ICC's long-accepted standards. The importance of oil pipelines to the national interest was recognized by their inclusion as one of the industries to be brought under the DOE Act, and this Court should act to remove the uncertainty over that industry's rates created by the Court of Appeals' decision.

Furthermore, the decision below contradicts decisions of this Court as to the breadth of agency discretion and the limits of the scope of judicial review. The Court of Appeals' decision, if allowed to stand, would have impact far beyond this case and would undermine principles heretofore established by this Court. The decision would severely restrict, if not eliminate, the discretion of regulatory agencies in choosing how to deal with complex, industry-wide issues of national import.

This Court should therefore grant this Petition for Certiorari, review the issues raised on their merits, and thereupon reverse the decision of the Court of Appeals and direct affirmance of the orders of the ICC.

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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-~~78~~-352

WILLIAMS PIPE LINE COMPANY AND
EXPLORER PIPELINE COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
FARMERS UNION CENTRAL EXCHANGE, ET AL
Respondents

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2138

FARMERS UNION CENTRAL EXCHANGE, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION*
and THE UNITED STATES OF AMERICA

WILLIAMS PIPE LINE CO.
EXPLORER PIPELINE CO., INTERVENORS

Petition for Review of an Order of
the Interstate Commerce Commission

Argued April 5, 1978

Decided June 27, 1978

John M. Cleary, with whom *Frederic L. Wood* was on the brief, for petitioners.

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* Substituted as respondent agency in place of the Interstate Commerce Commission by virtue of Public Law 95-91, §402(b), 91 Stat. 584 (August 4, 1977) and Executive order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Ron M. Landsman, Attorney, Department of Justice, with whom *John J. Power, III*, Attorney, Department of Justice, was on the brief, for respondent, the United States of America.

Christine N. Kohl, Attorney, Interstate Commerce Commission, with whom *Mark L. Evans*, General Counsel, and *Charles H. White, Jr.*, Associate General Counsel, were on the brief, for Interstate Commerce Commission.

J. Paul Douglas, Attorney, Federal Regulatory Commission, with whom *Philip R. Telleen*, Attorney, Federal Regulatory Commission, was on the pleadings, for respondent, Federal Regulatory Commission.

Robert G. Bleakney, Jr., with whom *David M. Schwartz* and *Robert L. Calhoun* were on the brief, for intervenor, Williams Pipe Line Company.

Donald W. Markham, with whom *Jonathan B. Hill* was on the brief, for intervenor, Explorer Pipeline Company.

Also *Hanford O'Hara*, Attorney, Interstate Commerce Commission, entered an appearance for Interstate Commerce Commission.

Also *Robert B. Nicholson* and *Andrea Limmer*, Attorneys, Department of Justice, entered appearances for respondent, United States of America.

Before MCGOWAN, LEVENTHAL and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge:* Petitioners, a group of oil shippers, challenge an order of the Interstate Commerce Commission (ICC) sustaining (1) increased rates filed by intervenor William Pipe Line Co. (Williams) and (2) joint rates initiated by Williams and intervenor Explorer Pipeline Co. (Explorer), as against claims that the former are

unreasonably excessive, *see* 49 U.S.C. §1(5)(a), and the latter are discriminatory, *see id.* §2, and illegally preferential, *see id.* §3(1).

This review proceeding is unique in that, while pending before us awaiting briefing and oral argument, jurisdiction over the rates in question was transferred by Congress from the ICC to the Federal Energy Regulatory Commission (FERC), and the latter has been substituted for the ICC as the respondent agency. FERC has advised this court that it takes no position with respect to the merits of the order under attack, and urges us rather to forego adjudication on the merits in favor of a remand of the case to it so that it can formulate, independently to the ICC, the regulatory principles it finds to be suitable for application in this new area of responsibility committed to it. The United States, a statutory respondent, purporting to see deficiencies in the ICC's decision, supports FERC's remand request.

The court, now having had the benefit of full briefing and oral argument of the merits by all parties except FERC, has concluded, to the extent and for the reasons hereinafter appearing, to remand the case to FERC for determination by it, under its new authority, of the compatibility of the subject rates with 49 U.S.C. §1(5)(a), and, in light of its findings thereon, for examination of the preference issue under *id.* §3(1). As to the existence of discrimination, however, petitioners' failure properly to raise the issue before the ICC mandates our affirmance of that agency's decision insofar as it is based on *id.* §2.

I

Williams, an independent common carrier, is a relatively new entrant in the oil pipeline transmission industry, having begun doing business in 1966 with the

purchase of Great Lakes Pipe Line Co. (Great Lakes). It acquired the physical assets of Great Lakes from eight petroleum producer-owners for $287.6 million—the highest among the competitive bids received.[1] The pipeline system thus acquired serves a large portion of the Midwest, with connections in such producing and refining cities as Tulsa, Fargo, Lincoln, and Topeka, and in such consuming cities as East St. Louis, Chicago, and Minneapolis. By interconnecting with intervenor Explorer Pipeline Co. (Explorer) at Tulsa, Williams also may connect refineries located along the Gulf Coast of Texas and Louisiana with consumers in the Midwest.

Petitioners are a group of oil producers and refiners located primarily in the Great Plains area who historically have used the Great Lakes-Williams pipeline system to transport their petroleum products to the Midwest. In late 1971 and early 1972, Williams informed them that it was raising its rates by approximately 15 percent (or 3 cents a barrel) across the board. At the same time as it generally increased its rates, Williams, together with Explorer, initiated joint rates for through service from the Gulf Coast to the Midwest. These joint rates are uniformly 9.5 cents a barrel lower than the combination of Williams' and Explorer's local rates.

Shortly after the appropriate tariffs were filed with the ICC, petitioners made them the subject of complaints under the provisions of the Interstate Commerce Act which, *inter alia*, regulates oil pipeline rates, 49 U.S.C.

[1] The ICC did not approve this sale for the reason that, unlike its regulatory authority with respect to other common carriers such as railroads, its jurisdiction over oil pipelines does not extend to the sale or acquisition of a pipeline company. *See* 40 U.S.C. §5(13); p. 9 *infra*. Although petitioners do not appear to claim that the price paid was irrational, they do insist that it was subject to the inflationary trend that has recently affected the American economy. The exact relationship of the price to the "fair market value," replacement cost, and reproduction cost of the Great Lakes enterprise is subject to dispute.

§1(1)(b). Petitioners' protests led the ICC to initiate investigations into the lawfulness of both sets of rates, although the disputed rates have remained in effect without suspension since their inception, pending the outcome of these proceedings. Although many claims were originally raised by the parties, the course of administrative consideration has left three major issues of import on appeal.

First, petitioners argue that Williams' rate increases for the transportation of oil in the area formerly served by Great Lakes are unreasonable under *id.* §1(5)(a),[2] because they are derived from an inflated valuation rate base[3] and allow an excessive rate of return on that rate base (10%); and further because certain operating expenses[4] and tax

[2] In relevant part, 49 U.S.C. §1(5)(a) provides:

> All charges made for any service rendered or to be rendered in the transportation of . . . property, . . . or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. . . .

[3] A valuation rate base allows the carriers to receive a return on the present "fair value" of all of its property devoted to public use. The Interstate Commerce Act, as amended by the Valuation Act, 37 Stat. 701 (1913), gives the ICC broad authority to "investigate, ascertain, and report the value of all property owned or used by" regulated carriers, 49 U.S.C. §19(a), based, *inter alia*, on "the original cost to date [of public assets], the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any." *Id.* §19a(b). It is generally accepted that in inflationary times the above formula will produce a rate base greater than one derived from "original cost" less depreciation to date of all assets committed to common carrier service, and lower than one derived from the reproduction cost (present cost of reproducing the same physical assets), the replacement cost (present cost of building a like enterprise taking advantage of modern technology), or the going concern value of the business enterprise as it might appear to an arm's-length purchaser.

[4] Petitioners object to Williams' inclusion of two items in the operating expenses for which it is entitled to compensation by way of rate revenues. First, Williams computed its depreciation charges by assuming that its wasting assets had a value equal to the price it paid Great Lakes in 1966 for the purchase of the pipeline, $286.7 million, plus

allowances[5] used by Williams in computing its rates were unreasonable. Second, petitioners claim that by charging them local rates to transport their oil from the Great Plains to the Midwest while charging the Gulf Coast shippers less (per mile)—under the joint Williams-Explorer rates—to transport their oil to the same destinations, intervenors are giving the Gulf Coast shippers an unjust preference. *Id.* §3(1).[6] Finally, petitioners argue

amounts spent since 1966 in adding new physical assets to the system. Petitioners consider this depreciation base excessive both because the purchase price as of 1966—due to inflation—is much higher than the sum of the monies actually spent over the years by Great Lakes in putting the physical assets in place, and because that depreciation base allegedly did not account for the fact that Great Lakes had already been compensated for almost $100 million worth of depreciation by way of prior rate revenues. Second, petitioners argue that payments by Williams to two affiliated companies for terminal leases and administrative services were unreasonably excessive, allegedly suggesting intracorporate extravagance that should not be charged to rate payers.

[5] In figuring its tax costs, Williams used the "normalization" method. Under this method, a regulated business accelerates its depreciation schedule for tax purposes, but figures its tax costs for ratemaking purposes as if it were paying the higher taxes required by a straight-line depreciation schedule. The difference between the two amounts is placed in a deferred tax reserve account, out of which the taxes are eventually paid, but on which the business in the meantime collects interest. *See* 26 U.S.C. §167(*l*)(3)(G). Alternatively, Williams could have reflected its present tax savings from accelerated depreciation in lower current costs for ratemaking purposes. This latter method allows current tax savings to "flow through" to current ratepayers, while burdening future ratepayers with the deferred taxes when they come due. Normalization, on the other hand, allows the current benefits and future burdens to be shared more equally by current and future ratepayers. *See generally* The Second National Natural Gas Rate Cases, No. 76-2000, *et al.*, slip op. at 29-39 (D.C. Cir. June 16, 1977). Petitioners contend both that the ICC should better explain its deviation from its past insistence on the "flow through" method of computing costs, and that it should take measures to assure that ratepayers will benefit from the interest revenues accruing to Williams' deferred tax account.

[6] In relevant part, 49 U.S.C. §3(1) provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular ... territory ... in any respect whatsoever; or to subject any particular ... territory ... to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

that by unevenly dividing the joint rate revenues with Explorer, Williams is giving the eight Gulf Coast shippers that jointly own Explorer a discriminatory rebate. *Id.* §2.[7] Petitioners asked the ICC to order Williams to lower—and Williams and Explorer to readjust—the rates in question, and to pay reparations plus interest, costs, and attorneys' fees.

Petitioners do not contest the propriety of the procedures used by the ICC in adjudicating their complaints. The administrative law judge announced his decision favorable to Williams on June 6, 1974, after holding several days of formal hearings in 1972 and 1973 and after considering copious written submissions. *Petroleum Products, Williams Bros. Pipe Line Co.* (unpublished initial decision) [hereinafter referred to as *Initial Decision* and cited to Joint Appendix (JA)]. Exceptions were filed by the petitioners on both sets of issues, thereby entitling them to consideration by a three-commissioner division of the ICC. On the basis of the record as well as the exceptions and replies filed by the parties, the division, one commissioner dissenting, accepted the findings of the administrative law judge. *Petroleum Products, Williams*

[7] 49 U.S.C. §2 provides:

> If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Bros. Pipe Line Co., 355 I.C.C. 102, 126 (1975) [hereinafter referred to as *Williams I*].

Petitioners next asked the entire Commission to reconsider the case, arguing that it involved "matters of general transportation importance"—the standard that must be met to secure reconsideration by the full Commission. Although asserting that the issues did not rise to the requisite level of importance, the full Commission felt that reconsideration of the record, as supplemented by written submissions by the parties, was merited "because of the relative dearth of precedent concerning petroleum pipeline rates, and in view of the substantial sums of money at issue. . . ." *Petroleum Products, Williams Bros. Pipe Line Co.*, 355 I.C.C. 479, (1976) [hereinafter referred to as *Williams II*]. In an opinion filed December 3, 1976, the full Commission, one commissioner dissenting and two not participating, affirmed the findings of the administrative law judge and the division, *id.*, and petitioners sought direct review by this court.

II

A.

In 1906, the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 379, was amended by the Hepburn Act to include companies engaged in the "transportation of oil . . . by pipe line" among the common carriers subject to regulation thereunder. Act of June 29, 1906, c. 3591, §1, 34 Stat. 584. Yet, while pipeline companies joined railroads, and were later joined by motor carriers, as regulatory subjects of the Interstate Commerce Act, those companies never faced the degree of regulation to which the vehicular common carriers were subject. Thus, while under the same duty as railroads and/or motor carriers to furnish or allow continuous transportation, 49 U.S.C. §§1(1), 1(4), 7,

to establish, file, and publish reasonable, nondiscriminatory rates subject to ICC approval, *id.* §§1(5), 3(1), 4(1), 6, 15(1), to avoid certain pooling relationships, *id.* §5(1), to file certain financial reports, and to use certain accounting procedures subject to ICC specifications, *id.* §§20(1), (2), (4), (5), pipeline companies have none of the special obligations imposed upon the vehicular regulatees under the Act concerning acquisitions, mergers, corporate affiliates, uniform cost and revenue accounting, issuance of securities, and corporate or financial reorganizations. *Id.* §§5(2)-(13), 20(3), 20a, 20b, 20c. For this reason, we may intuit a congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries and, as such, we should be especially loath uncritically to import public utilities notions into this area without taking note of the degree of regulation and of the nature of the regulated business. *See* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 4-5 (1961).

Consequently, beyond the general outlines of the Interstate Commerce Act, and the specific provisions therein dealing with ratemaking, *see* notes 2, 6 & 7 *supra*, we have little to rely on in constructing a theory of oil pipeline ratemaking. Although the Act, as amended by the Valuation Act, 37 Stat. 701 (1913), does provide the ICC with the wherewithal to gather the information necessary to determine the "valuation" of railroads *and* oil pipeline companies, 49 U.S.C. §19a, *see* note 3 *supra*, we see nothing in the Valuation Act that requires the agency to translate its valuation authority into a mandatory approach to ratemaking or that makes a valuation approach inevitably reasonable.[8]

[8] Congress passed the Valuation Act at a time when the Supreme Court appeared to require ratemaking to proceed from some type of valuation base. *See, e.g.*, Smyth v. Ames, 169 U.S. 466, 546-47 (1898). The exact components of "fair value" were still "undergoing modification" in the courts as of 1913, however. 49 Cong. Rec. 3796 (1913)

ICC precedent provides little additional guidance as to appropriate ratemaking methodology for the oil pipeline industry. In the four published opinions in which it has heretofore discussed oil pipeline ratemaking, the ICC adopted the valuation rate base without discussion, or even explicit recognition, of alternative bases. *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940) [hereinafter *Reduced Rates I*], *reopened*, 272 I.C.C. 375 (1948) [hereinafter *Reduced Rates II*]; *Petroleum Rail Shippers' Ass'n v. Alton & So. R.R.*, 243 I.C.C. 589 (1941); *Minnelusa Oil Corp. v. Continental Pipe Line Co.*, 258 I.C.C. 41 (1944). Nonetheless, the ICC's use in the 1940's of the

(remarks of Sen. La Follette). In putting its gloss on the *Smyth* doctrine, the ICC wished to include original cost of physical assets as one factor relevant to valuation, but found itself stymied by the railroads' refusal to supply it with the information necessary to determine that cost. *Id.* at 3795-96. Consequently, Congress enacted the Valuation Act to give the agency the necessary information-gathering ability with respect to original cost, as well as to the more easily determined cost of reproduction new. *Id.* at 3796. The drafters, however, were decidedly not "prepared . . . to set the boundaries and fix the limits [of ratemaking] absolutely by statute." *Id.* Their mission was merely to allow the necessary facts "to be secured for the enlightenment of the Commission and the courts." *Id.*

Once the Supreme Court made clear its willingness to countenance any ratemaking approach that enabled investors to cover operating expenses and capital costs without burdening consumers with exorbitant rates, *see, e.g.*, FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944), even the historical link between ratemaking theory and the valuation-computation authority given ICC by the Valuation Act was broken. After that time, in fact, the apparent endorsement by the Valuation Act's drafters of significant reliance on original cost as a rate base stands as an equally strong indication that past investment rather than present value should predominate in ratemaking methodology. *See, e.g.*, 49 Cong. Rec. 3795 (remarks of Sen. La Follette). The important point, however, is that in passing the Valuation Act, Congress explicitly refused to endorse any ratemaking theory, and, in fact, its complete preoccupation with railroads and its understandable failure to predict the inflationary economy of a half century later make its deliberations on the Act largely irrelevant to oil pipeline ratemaking in the 1970's. Consequently, to the extent that the ICC finds a mandate for "fair value" ratemaking in the Valuation Act, we disagree. *See Williams I*, *supra*, 351 I.C.C. at 114. *But see Initial Decision*, *supra*, JA at 1605-06.

"fair value" method is not hard to explain—and in that explanation lies an important reason to reexamine the continued viability of the decisions announced during that era.

The ICC's primary experience with ratemaking prior to the 1940's involved railroads, as to which a landmark Supreme Court case had appeared to mandate the fair value method of ratemaking. *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898); *see* note 8 *supra*. *See also St. Louis & O'Fallon Ry. Co. v. United States*, 279 U.S. 461 (1929). Subsequently, the Supreme Court's endorsement on this method was extended to other areas. *E.g.*, *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 262 U.S. 276 (1923). Although under the impetus of Justice Brandeis' concurring opinion in the last-cited case, *id.* at 289-312, the Supreme Court during the 1930's began to countenance experimentation with other ratemaking approaches, *e.g.*, *Railroad Comm'n of California v. Pacific Gas Co.*, 302 U.S. 388, 399 (1938), by this time the ICC had established a firm practice of using the valuation method. *E.g.*, *Petroleum Rail Shippers*, *supra*. Thus, the ICC practice, reflected in the four pipeline rate cases cited earlier, of using a valuation rate base had become ensconced in that agency's decision by 1944, when the Supreme Court decisively reversed its field and became openly critical of talismanic reliance on "fair value." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944). Moreover, between the time that *Hope's* implications became clear and the ICC's consideration of this case, that agency did not have occasion to discuss the principles of oil pipeline ratemaking.[9] As such, we are left to draw our conclusions about this case based on a series of ICC opinions that arose

[9] The ICC has explained the "dearth of precedent concerning petroleum pipeline rates," *Williams II*, *supra*, 355 I.C.C. at 481, as in part a function of the ownership of many of the pipelines by shippers. *See Reduced Rates I*, *supra*, 243 I.C.C. at 138-39. Thus, shippers, who generally are the complainants before the ICC in rate cases, are often responsible for, rather than affected by, potentially unreasonable oil

in a ratemaking environment that has since been dramatically altered by the Supreme Court.[10]

In addition to the significant changes in the relevant *legal* environment since the ICC's 1940's decisions, important *economic* transformations have occurred. First, that agency's only actual comparison in the 1940's of the "valuation" of pipeline assets and the actual investment therein "as carried on [the pipeline companies'] books" (*i.e.*, apparently, original cost) shows that in a majority of cases "the valu[ations] found by the Commission were materially *lower* than the carriers' investment...." *Reduced Rates I, supra*, 243 I.C.C. at 138 (emphasis added). This 1940's situation is in marked contrast to that experienced in today's inflationary economy wherein valuation typically *exceeds* investment by a substantial amount.[11]

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pipeline rates. Two of the ICC's four precedents in this area, in fact, derive from nonadversary, ICC-originated investigations. *Reduced Rates I, supra; Reduced Rates II, supra.*

Railroad rate-setting—another major source of ICC jurisdiction over rates—has also presented the agency with limited opportunity for developing post-World War II ratemaking theory, because the general decline of the rail industry has made academic the problem of unreasonably high rates of return. Nonetheless, in this proceeding, the ICC acknowledged that in those railroad ratemaking cases that have considered the issue since the early 1950's, the Commission has abandoned the valuation base, due to the difficulty of determining reproduction cost. *Williams I, supra*, 351 I.C.C. at 114-15 (discussing Increased Freight Rates, 1951, 297 I.C.C. 17, 25 (1955)). *See* Net Investment —Railroad Ratebase and Rate of Return, 345 I.C.C. 1491, 1514-20, 1604 (1976); Brief for Interstate Commerce Commission, at 13-14. Instead, railroad ratemaking has focused on original cost, present value of land and rights, and working capital needs. *See also* Increased Rates and Minimum Charges Within, From, and to the South, 335 I.C.C. 77, 97 (1969) (using original cost and rejecting valuation ratemaking for motor carriers).

[10] To the extent that the Valuation Act encouraged the ICC to use the "fair value" method, it, too, is a product of *Smyth v. Ames*, and has limited relevance to ratemaking theory since *Hope*. *See* note 8 *supra*.

[11] *See* note 3 *supra*. For example, in this case, a valuation rate base would require a return on $167.6 million, while an original cost base would require a return on $101.1 million. *Williams I, supra*, 351 I.C.C. at 108.

Second, based on rather detailed analyses of economic conditions facing the industry in the 1940's, the Commission's 1940's decisions determined that oil pipeline rates should allow carriers to recover operating expenses plus no more than either an 8 percent return on value for transmission of crude oil or crude oil plus refined petroleum products, *Reduced Rates II, supra*, 272 I.C.C. at 376, 384 (rates upheld actually producing 7.6 percent rate of return); *Minnelusa, supra*, 258 I.C.C. at 54; *Reduced Rates I, supra*, 243 I.C.C. at 142, *or* a 10 percent return on value for transmission of gasoline. *Petroleum Rail Shippers, supra*, 243 I.C.C. at 663. The ICC pointed out that by 1940's standards these rates of returns were

> somewhat larger ... than ... would be reasonable to expect would be applied in industries of a more stable character, where the volume of traffic is more accurately predictable.

Minnelusa, supra, 258 I.C.C. at 54, *accord, Petroleum Rail Shippers, supra*, 243 I.C.C. at 661-62; *Reduced Rates I, supra*, 243 I.C.C. at 142.

In the Commission's estimation, these "somewhat larger" rates of return were justified on the one hand by the need to attract capital to the oil pipeline industry despite the higher-than-normal risks faced by carriers of petroleum products,[12] and especially of gasoline,[13] and on

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[12] The special "hazards" adverted to by the ICC were the pipelines' total dependence on one commodity that flows in only one direction and that must flow in consistently large quantities to be economical, the depletable nature of that commodity, and its exposure to large and unpredictable fluctuations in availability depending upon the discovery of new oil fields. *See Petroleum Rail Shippers, supra*, 243 I.C.C. at 661; *Reduced Rates I, supra*, 243 I.C.C. at 122-23. Interestingly, the Commission seemed much more moved by the concern that the opening of new domestic fields would rearrange distribution lines than that domestic oil reserves would in fact be depleted in the near future. *See id.*

[13] In addition to the general "hazards" of the oil pipeline industry discussed in note 12 *supra*, gasoline transmission by pipeline faced

the other hand, by the need to keep rates low enough to forestall the dangers of oligopolistic control of the oil pipeline industry by the big producers.[14] Other factors considered by the ICC were the possibility of price fixing[15] and a history of "enormous" profits,[16] the cost effects of greatly increased taxation during the 1930's,[17] the increased demand for oil products, the improved technology of pipeline transmission precipitated by World War II,[18] and the prediction that economic forces would cause rates to drop regardless of ICC action.[19] Notably, aside from brief discussions of increased labor costs, the ICC's decisions make clear the operating costs other than taxes were relatively free from inflationary (or deflationary) influences from 1937 to 1947.[20]

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special risks of its own. Most importantly, such transmission was in its "initial stages" in the 1940's—adequate pipeline technology only recently having been developed—and its "speculative" nature prevented financing through bond issues. *Petroleum Rail Shippers, supra*, 243 I.C.C. at 599-600, 661. Although the ICC never said so explicitly, these special hazards apparently dictated its use of the 2% higher rate of return for gasoline transmission than crude oil transmission.

It is noteworthy that by 1948, the ICC was no longer willing to accept the "general assertion that rates for pipe-line service should make allowance for the need of [higher] earnings in view of the material hazards of the business." *Reduced Rates II, supra*, 272 I.C.C. at 381. Nonetheless, having made this observation, the ICC continued to utilize the 8% rate of return maximum that it developed at a time when it did accept the industry's "higher risks" assertion. *Id.* at 376, 384.

[14] *See Reduced Rates I, supra*, 243 I.C.C. at 138-39.

[15] *Id.* at 125, 139.

[16] *Id.* at 130-42. The ICC found it troubling that despite rate reductions in the 1930's caused by pressures from state public utilities commissions and by increased taxes on profits, and despite the depression, the average oil pipeline company under investigation between 1934 and 1938 earned a 14% rate of return on value—and some of those companies earned as high as 45%. *Id.* at 125, 141-42.

[17] *Id.* at 129; *Reduced Rates II, supra*, 272 I.C.C. at 382.

[18] *Reduced Rates II, supra*, 272 I.C.C. at 377-80.

[19] *Reduced Rates I, supra*, 243 I.C.C. at 127; *Reduced Rates II, supra*, 272 I.C.C. at 381.

[20] *See Reduced Rates I, supra*, 243 I.C.C. at 129; *Reduced Rates II, supra*, 272 I.C.C. at 381.

To the extent that economic conditions facing the oil pipeline industry have changed since 1948—and, in light of modern onslaught of inflation, petroleum shortages, and reliance on imports, as well as the maturing of the industry itself, we may readily assume they have—the conclusions of the ICC in its earlier cases as to appropriate rates of return are equally as much artifacts of a bygone era as is its reliance then on a valuation rate base.

Finally, the ICC's 1940's cases recede even further into the background when it is realized that the ICC has been replaced by FERC as the government agency charged with watching over oil pipeline rates.[21] The transfer of authority to FERC occurred during the pendency of this petition pursuant to the Department of Energy Organization Act (the DOE Act), Pub. L. No. 95-91, §402(b), 91 Stat. 584 (1977), *effectuated*, Executive Order No. 12009, 42 Fed. Reg. 46267 (Sept. 15, 1977), *implemented*, 42 Fed. Reg. 55534 (Oct. 17, 1977). Although, the DOE Act provides that litigation commenced before the transfer shall continue, with "appeals taken, and judgments rendered . . . as if this Act had not

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[21] In fact, it was FERC (in its previous incarnation as the Federal Power Commission) that, by deviating from "fair value" ratemaking, inspired the Supreme Court's holding that valuation is not the *sine qua non* of "just and reasonable" ratemaking. *See* FPC v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944). In that case, the Commission had used a modified original cost method in determining that the rates charged by a producer-distributor of natural gas were unreasonably high. The Fourth Circuit overturned the Commission's order in part because it felt that the rate base should reflect the valuation of the property. Hope Natural Gas Co. v. FPC, 134 F.2d 287 (4th Cir. 1943). In reversing the Fourth Circuit, the Supreme Court noted that basing rates on present value, which in turn is a function of expected rate revenues, is analytically unsound. 320 U.S. at 601. Without endorsing "any single formula," the Court made clear that it would uphold rates set by any methodology (including one beset by "infirmities") if the "end result" allowed a return on equity "commensurate with returns on investment in other enterprises having corresponding risks," and "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* at 603.

been enacted,"[22] as regards the substantive administrative law applicable in this case, the transfer further unsettles the foundations on which we must adjudicate this petition. Thus, it removes the stabilizing influence of the courts' usual desire to afford an administrative agency some latitude over time to develop its own approach to the regulatory tasks delegated to it by Congress. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). Here, the transfer of authority has deprived us of even the possibility of endorsing ICC's attempt to develop such an approach, and, in fact, has created the likelihood that anything we say will inhibit *FERC* from freely developing its approach in the future. That FERC has refused to adopt the ICC's position in this case, and—joined by the Antitrust Division of the Department of Justice—has asked that the case be remanded to it, illustrates this problem.[23]

[22] Pub. L. No. 95-91, §705(c)(2), 91 Stat. 607 (1977). For this reason, a panel of this court denied the motion of FERC to have the case *automatically* remanded to it, following the transfer of authority from the ICC. Farmers Union Central Exchange v. FERC, No. 76-2138 (D.C. Cir. Nov. 21, 1977). Section 705(c)(2) required the panel to treat the motion as if it were made by the ICC. And, absent some special showing of "legal blemish"—or of a supervening change in the law, a "significant change in conditions or newly-discovered evidence"—we are generally reluctant to remand an agency's decision to it for reconsideration after the statutory time for agency reconsideration has passed and a petition for review has been filed with us. Greater Boston Television Corp. v. FCC, 463 F.2d 268, 290 (D.C. Cir. 1971); *see* NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974); Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967). In such cases, it is recognized that the winning party has an interest in the opportunity to defend the agency's original determination.

This rule, however, does not apply where, as here, the winning party below (joined, in fact, by one of the agencies involved) *has* had the opportunity to defend the agency's decision before us, *see* the note 23 *infra*, and where that defense has not removed apparent "legal blemish[es]" in that decision that have surfaced during our consideration.

[23] In successfully seeking remand before oral argument, *see* note 22 *supra*, FERC refused to take a position in this case. Accordingly, the Court approved the ICC's filing of a brief in support of its decision, and ordered it to participate in oral argument on the merits. Farmers Union Central Exchange v. FERC, No. 76-2138 (D.C. Cir. April 5, 1978).

This background should explain our reluctance to embark on the first federal judicial foray into the area of oil pipeline ratemaking.[24] In this endeavor, beyond the statute's admonition that rates be "just and reasonable," we must rely almost entirely on the ICC's opinions in this case. Moreover, as the next section demonstrates, those opinions are characterized by analytical difficulties that undermine their usefulness in resolving the overall reasonableness of the assailed rates.

B.

The parties have joined issue over the ICC's treatment of five criteria they deem crucial to the reasonableness of Williams' rate increases: rate base, rate of return, depreciation costs, tax treatment, and certain items of operating expenses. *See* notes 2-5 *supra* and accompanying text. In reaching our conclusion that the ICC's decisions[25] present problems that impel us to remand the reasonableness issue to its successor, FERC, we find it necessary to dwell on only the first three of these criteria.

Despite petitioners' insistence on original cost less depreciation of all of Williams' assets used in transmitting

[24] Although the first, it almost assuredly is not the last in light of the dramatic recent expansion in this nation's reliance on oil pipeline transmission. *See* Mobil Alaska Pipeline Co. v. United States, 557 F.2d 775 (5th Cir.), *aff'd sub nom.* Trans Alaska Pipeline Rate Cases, 46 U.S.L.W. 4587 (U.S. June 6, 1978) (involving preliminary questions of ICC's authority to set *initial* rates for the Trans Alaska pipeline).

[25] Although the full ICC eventually passed on petitioners' claims, its opinion (*Williams II*) essentially supplements the opinion of a three-commissioner division of the agency (*Williams I*) which, in turn, adopts the findings of the administrative law judge's *Initial Decision*. *See Williams II*, *supra*, 355 I.C.C. at 482; *Williams I*, *supra*, 351 I.C.C. at 126. Hence, all three opinions will be examined herein.

oil (*i.e.*, $101.1 million), and Williams' somewhat tentative advocacy of purchase price ($287.8 million) as the appropriate rate base, the ICC used a "valuation" base. *Williams I, supra*, 351 I.C.C. at 108. This it calculated to be $167.6 million, *id.*, based primarily on two factors listed in the Valuation Act, 49 U.S.C. §19a—original cost, and the cost of reproduction new.[26] All three decision based their analyses of the rates on the percent return they allowed on valuation, so that the importance to all three of the valuation rate base cannot be gainsaid.[27]

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[26] *See Williams I, supra*, 351 I.C.C. at 111. *See also* Williams Bros. Pipe Line Co., 338 I.C.C. 549 (1970) (most recent published valuation by ICC of Williams).

Other factors considered in the ICC's complex valuation formula include reproduction cost new minus depreciation, going concern value, present value of land and rights-of-way, and working capital. *See Williams I, supra*, 351 I.C.C. at 111-12. *See generally* note 3 *supra*.

[27] *See Initial Decision*, JA at 1609; *Williams I, supra*, 351 I.C.C. at 105; *Williams II, supra*, 355 I.C.C. at 483-84.

Reference was made by the administrative law judge to the "end result" doctrine of FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), *see* notes 8 & 21 *supra*. *See* JA at 1606-08. Nonetheless, having attempted to show that an original cost base might impair Williams' financial integrity—a concern reflected in *Hope*—he failed to discuss what "returns [characterize] investments in other enterprises having corresponding risks," and whether Williams' rates allow returns "commensurate" therewith. 320 U.S. at 603; *see* JA at 1607-08. Nor did his mention of Williams' contention, JA at 76, 2622, that a 14% return on equity is "necessary and . . . fair," serve this purpose, because *he* made no such finding to that effect, nor did he find the rates actually allowed that, or any other return (the only relevant testimony, not relied upon, showed an actual return on equity of between 10.9 and 12.5%), nor did he reply in any way on the 14% figure. *Id.* at 1608, 1609. Even more telling, neither the three-commissioner division nor the full Commission paid even this exiguous attention to *Hope* or to the actual cost of equity capital to Williams. *See Williams I, supra*, 351 I.C.C. at 114.

See Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n 262 U.S. 276, 289-312 (1923) (Brandeis, J., concurring), for the classic critique of the fair value rate base, characterizing that methodology as "vicious[ly] circ[ular]" from an analytical standpoint, difficult to administer given the vagaries of determining reproduction or replacement cost, and likely to impair capital or produce windfall profits in, respectively, deflationary or inflationary times. *See also FPC v. Hope Natural Gas Co., supra*, at 601.

Most prominent among the three opinions' explanations of the use of the "fair value" method was that as the "traditional," "customar[y]," and "well-established practice" of the ICC in oil pipeline cases, valuation ratemaking has "withstood the test of time." *Initial Decision, supra*, JA at 1608; *see id.* at 1605; *Williams I, supra*, 351 I.C.C. 105, 107, 113, 114; *Williams II, supra*, 355 I.C.C. at 485. In support of this "tradition," however, the opinions (when they cite any support at all) list only (1) the 1940's oil pipeline cases discussed above, (2) the Commission's history of computing valuations under the Valuation Act, and (3) the fact that the Commission's mandatory accounting procedures for pipelines, *see Uniform System of Accounts for Pipeline Companies*, 337 I.C.C. 518, 523 (1970), are geared to the use of a valuation rate base. *See Initial Decision, supra*, JA at 1605, 1608; *Williams I, supra*, 351 I.C.C. at 107, 113.

As our previous discussion indicates, however, these three indicia of a tradition of fair value ratemaking are weak and outmoded. Both the oil pipeline precedents and the history of valuation computations under the Valuation Act are in large measure products of a bygone era of ratemaking ushered in by the Supreme Court in *Smyth v. Ames* in 1898 and ushered out by that same body in *Hope Natural Gas* in 1944. *See* notes 8-10 *supra* and accompanying text. To the extent that the ICC's accounting rules derive their valuation focus from the 1940's precedents and the Valuation Act, *see Uniform System of Accounts, supra*, 337 I.C.C. at 523, they, too, are subject to this same criticism.

Moreover, each of the three indicia suffers from infirmities of its own. First, even if we assume under *Hope* that valuation ratemaking might be capable of producing a viable "end result," there is no assurance in the Commission's 1940's precedents—born as they were of peculiar post-depression, World War II, and post-War economic

conditions—that such a result will occur in the 1970's. Second, the Commission itself has seen fit to abandon its so-called tradition of valuation computation and ratemaking based thereon in the railroad area, which is equally subject to the Valuation Act. *See* note 9 *supra*. Finally, the ICC decision setting forth pipeline accounting rules states explicitly that it is

> concerned . . . with accounting rules which are not necessarily dispositive of the manner in which expenditures will be treated in a proceeding to determine the reasonable level of particular rates.

Uniform System of Accounts, *supra*, 337 I.C.C. at 523. This last-quoted caveat should hardly have to be express. After all, it is rates, not bookkeeping, that the statute requires to be reasonable, and there is no assurance of record, at least, that reasonable accounting measures translate automatically into reasonable rates.

In sum, we are not persuaded by the Commission's conclusion that "consistency and fairness" dictate resurrection of the "fair value" method last used thirty years ago. *Williams II*, *supra*, 355 I.C.C. at 484. To the extent that the method was wrongly grounded in the law at that time, it is no better off now. To the extent that it may have been rightly grounded in the economics of that day, the ICC has provided us with no reason to believe that three decades have not changed the situation. And, to the extent that Williams, having nothing else to depend on but the earlier cases, justifiably relied on them in adopting its rates, *see id.*, the solution is not to perpetuate that reliance, but to end it prospectively, without allowing reparations based on its occurrence in the past.[28]

[28] *See* note 35 *infra*. Of similar effect is the ICC's argument that the valuation method is so well established that it may only be revised by way of a rulemaking proceeding in which all interested parties may take part. *Initial Decision*, *supra*, at 1605; *Williams I*, *supra*, 351 I.C.C. at 112-13, *Williams II*, *supra*, 355 I.C.C. at 484. Although the agency's premise that the valuation method is well-established may be doubtful, we do not question the agency's discretion to choose between adjudicatory or quasi-legislative means of adopting a new methodology for the future. Nonetheless, petitioners have challenged Williams' past rates as unreasonable, and section 1(15)(a) of the Interstate Commerce Act states that no unreasonable rate may stand. The ICC could have, but did not, hold this case in abeyance pending completion of a broad rulemaking proceeding that it had initiated to review its oil pipeline ratemaking theory. *See* Ex Parte No. 308, Valuation of Common Carrier Pipelines (order served Jan. 9, 1977), *transferred to FERC*, 42 Fed. Reg. 55534 (1977). Instead, it adjudged Williams' rates to be reasonable, based in part upon a "fair value" rate base. It is accordingly of no solace to petitioners—or to us in reviewing their petition—that at some time in the future, the Commission (or its successor) may, by rulemaking, adopt a wholly different approach.

Aside from the above arguments, the three ICC opinions mentioned but one other justification for the "fair value" method: the need for a ratemaking theory responsive to inflation.[29] We have no quarrel with the ICC's aspirations on this score. The Supreme Court has indicated that rates must be high enough to allow the regulatee to attract capital, and investors will be unlikely to invest if their earnings will not keep abreast of, and have some chance of exceeding, the rate of inflation. *See FPC v. Hope Natural Gas Co.*, *supra*, 320 U.S. at 603. Nonetheless, the ICC's failure to assess the actual effects of inflation on Williams' ability to attract capital, and its apparent "double counting" of concerns about inflation,

[29] *See Initial Decision*, *supra*, JA at 1607, 1608; *Williams I*, *supra*, 351 I.C.C. at 111, 117. The degree to which the ICC's valuation rate base responds to inflation is a matter of doubt. The administrative law judge opined that it "only partially reflects inflation since it considers both the original cost to the first investor and the reproduction cost new, not just the latter." Initial Decision, *supra*, JA at 1607. Nonetheless, by including the cost of reproduction new rather than that of replacement, *see Williams I*, *supra*, 351 I.C.C. at 109-10, 111; note 8 *supra*, the valuation formula is weighted rather heavily toward inflation. That is to say, since reproduction new reflects the higher prices characteristic of modern materials, without also reflecting the efficiencies of modern technology—as would replacement cost—it overemphasizes inflation's effect on the hypothetical cost of reconstructing the plant.

see pp. 26–27 *infra*, cast a shadow over its conclusion that a valuation rate base properly reflects inflation.

We find the ICC's discussion of rate of return equally problematical. Here the *total* emphasis is on the 1940's precedents: because 8-10 percent was a viable return for carriers of petroleum products from 1940 to 1948, it is said, so must it be today.[30] Even more so than the choice of a reasonable rate base methodology, a "reasonable rate of return" determination must be the product of the economic moment. As noted earlier, the ICC's choice in the 1940's of the 8 and 10 percent figures turned on such "hazards" as the infancy of the gasoline industry, the likelihood of disruptive discoveries of new oil fields and the unidimensional nature of the product market served by pipeline carriers, as well as on such factors as unduly high profits in the past, high taxes, and a rapidly expanding economy relatively free of inflation. *See* notes 12-20 *supra* and accompanying text. Absent some accompanying assessment of how this complex of relevant factors has changed in thirty years, the ICC's reliance on its antiquated precedents in determining a reasonable rate of return differs little from a rule that would require modern automobile accident damages to conform to those awarded by juries in 1940.[31]

[30] *See Williams I*, *supra*, 351 I.C.C. at 105-06; *Williams II*, *supra*, 355 I.C.C. at 483, 487. The Commission found that Williams' rates produced rates of return (on valuation) of between 8 and 9%.

[31] For example, the Commission in the 1940's held the line for crude oil transmission companies at an 8% rate of return, but allowed gasoline carriers to receive 10%. The only discernible reason for the disparity was the infancy of the gasoline transmission industry. *See* note 13 *supra*. This special "hazard" having presumably matured out of the picture over the last three decades, we might well have expected the 8% ceiling to be applied to gasoline as well as crude oil carriers—in which case Williams' rate of return would be excessive. *See* note 30 *supra*. Nonetheless, no explanation is forthcoming from the ICC for its continued reliance on the 10% figure, despite the absence of an important factor used in ascertainment thereof.

This is not to imply that we think an 8 or 10% rate of return is necessarily excessive. Such modern "hazards" as inflation and the uncertain availability of foreign oil, as well as special risks facing Williams, *see* JA at 184-90, 2575-81, may well warrant the opposite conclusion. Our point is simply that the ICC's criterion for reasonableness—blind adherence to 1940's standards—is unconvincing.

Finally, we come to the depreciation charges allowed Williams as a cost that it may recoup through its rates. Just prior to Williams' purchase of Great Lakes, it secured a Commission opinion that the Commission's accounting instructions for pipeline carrier property accounts, 49 C.F.R. §1204-3-1 *et seq.*, applied to the purchase. JA at 202, 205. Under those instructions, Williams recorded its full purchase price of $287.6 million in its property account. Although the ICC informed Williams that this opinion did "not prejudice the Commission's continuing rights and responsibilities with regard to . . . rate determinations that may come before it," JA at 205, Williams used this same method of valuing its wasting assets when calculating depreciation expenses for ratemaking purposes. Allowing this revaluation, for ratemaking as well as accounting purposes, of the Great Lakes-Williams property not only greatly increased depreciation charges from that point forward, but it also withdrew any recognition that rate payers had already been charged almost $100 million for depreciation by Great Lakes.

In upholding this operating expense calculation, the Commission did little more than (1) note the calculation's congruence with its reporting and accounting rules, especially as discussed in *Uniform System of Accounts*, *supra*, and (2) point out the inability of petitioner's recommended original cost approach to keep pace with inflated property values. *Williams II*, *supra*, 355 I.C.C. at 489. Once again, we cannot countenance the ICC's current unexplained insistence on irrevocably hitching its ratemaking theory to its accounting rules. This linkage is especially troublesome because, when it wrote those rules,

the Commission expressly denied them any such controlling impact on rates. *See* p. 22 *supra*. It supported that express denial of linkage with a reminder that the ICC traditionally did not tie rates to "investment as shown on the carriers' books, but rather [to] . . . valuations [computed] pursuant to the [Valuation Act]." *Uniform System of Accounts*, *supra*, 337 I.C.C. at 523. Hence, we are left with the additional unexplained anomaly of a valuation rate base coexisting with a purchase price depreciation base—hardly an "accepted . . . practice[ ]."[32]

The final irrationality is that the depreciation basis used, unlike original cost, valuation, and other possible approaches, allows depreciation charges, and thus the rates, to change dramatically from one day to the next—so long as a purchase of the assets intercedes—even though the cost of the carriers' public service has not actually changed. It is true that occasional acquisitions of carriers at prices deemed currently reasonable might serve as a mechanism for accurately reflecting inflation's impact on the value of such enterprises. We have our doubts, however, about either the desirability of encouraging acquisitions solely for this purpose, or of depending on their unpredictable occurrence to serve this function. In any case, the ICC in this case purports to have recognized inflation in figuring rate base (and perhaps even rate of return, *see Williams II*, *supra*, 355 I.C.C. at 487), so that a further inflation adjustment by way of increased depreciation charges would seem precipitous and itself unduly inflationary. *See* p. 23 *supra*.

The foregoing discussion illustrates our unease with the ICC's findings regarding rate base, rate of return, and depreciation costs. Those three criteria, in turn, are important enough that doubts as to them must infect our

[32] A major determinant of ICC's reporting rules were "accepted accounting practices." *Uniform System of Accounts*, *supra*, 337 I.C.C. at 522.

view of the Commission's ultimate finding of reasonableness.[33] Nonetheless, were this a normal case, the limited scope of review under which we operate in these proceedings might require us to look beyond ICC's rationale to the record itself, before we would be prepared to disapprove the Commission's ultimate holding. *See, e.g., Permian Basin*, *supra*, 390 U.S. at 766-67 (rate must be upheld if total effect is reasonable); *FPC v. Hope Natural Gas Co.*, *supra*, 320 U.S. at 603 (rate must be upheld, even if subject to theoretical "infirmities," if "end result" is reasonable); *The Second National Natural Gas Rate Cases*, No. 76-2000, *et al.*, slip op. at 18 (D.C. Cir. June 16, 1977) ("basic . . . requirement [is] that there be support in the public record for what is done.").

But this is not a normal ratemaking case—in large measure because we are at something of a loss to know what to look for should we resort to the public record. The lack of viable precedents in this area and thus of some semblance of established ratemaking theory undercuts any confidence we have that we can make a "reasonableness" determination in the absence of some significant assistance from the agency formerly charged with making that determination in the first instance. Moreover, the record appears to be incomplete in certain significant respects. *See* note 27 *supra*. What clinches our decision to remand on the reasonableness issue, however, is the fact that the agency *now* charged with that responsibility, FERC, has requested a remand so that it may begin its regulatory duties in this area with a clean slate. While "infirmities" in an agency's methodology may not prevent us from affirming its otherwise supportable "reasonable rate" determination, *see FPC v. Hope Natural Gas Co.*, *supra*, 320 U.S. at 603, such "legal blemishes" may

[33] *See* Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968). For this reason, we do not find it necessary to address petitioners' further challenges based on Williams' tax treatment and computation of certain operation expenses. *See* notes 4 & 5 *supra*.

justify us in honoring that agency's (or its successor's) request that we remand its decision for reconsideration. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 290 (D.C. Cir. 1971); note 22 *supra*.

Under the circumstances presented herein, it seems logical both to avail ourselves of some additional expertise before we plunge into this new and difficult area, and to allow the relevant administrative agency to attempt for itself to build a viable modern precedent for use in future cases that not only reaches the right result, but does so by way of ratemaking criteria free of the problems that appear to exist in the ICC's approach. *See* note 24 *supra*. *Cf. Permian Basin*, *supra*, 390 U.S. at 790 ("breadth and complexity of the [agency's ratemaking] responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.")

We realize that this disposition is at the expense of important finality concerns, embodied herein by intervenor Williams Pipeline Co. which has already faced six years of litigation and continues to face the possibility of reparations back to 1972 should its increased rates ultimately be found unreasonable. In subordinating those concerns to the public interest in an orderly ratemaking environment for oil pipeline transmissions, we rely on assurances from counsel for FERC that the agency will move this case through its ratemaking procedures with dispatch. Moreover, because Williams is hereby being exposed to the possibility of future operations under an unreasonable rate, not because of its own actions freely taken in the past, but because of FERC's quasi-legislative action[34] taken—with our sanction—with an eye to the future activities of all oil pipeline carriers, we are comforted by the apparent applicability of the rule that

[34] That is, seeking remand for reconsideration.

reparations are generally not available when the subject rates were in force as a result of quasi-legislative actions of a regulatory agency.[35]

For all of the foregoing reasons, we remand the case to FERC for determination of the reasonableness of Williams' rates pursuant to 40 U.S.C. §1(5)(a). As a result of the necessity of remanding this issue, we are also constrained not to decide the preference/prejudice issue under 49 U.S.C. §3(1). *See* note 6 *supra* and accompanying text. This latter issue involves, *inter alia*, questions of (1) whether a disparity exists between Williams' local rates and the through rates it has jointly initiated with Explorer, (2) if so, whether petitioners are competitively damaged thereby, and (3) if so, whether cost differentials, or other "transportation conditions," justify the disparity. *See State of New York v. United States*, No. 76-4085, slip op. at 2134 (2d Cir. 1977); *Chicago & E. Ill. R.R. v. United States*, 384 F. Supp. 298, 300-01 (N.D. Ill. 1974) (three-judge court), *aff'd mem.*, 421 U.S. 956 (1975). Since, on remand of the reasonableness issue, FERC will undoubtedly obtain additional evidence and conceivably could order that Williams lower its local rates, the nature of each

[35] *See, e.g.*, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry Co., 284 U.S. 370, 385, 389 (1932); Moss v. CAB, 430 F.2d 891, 895-96 & n.24 (D.C. Cir. 1970); cases discussed in *id.* at 897-99 nn.29-33.

The exact confines of this rule need not be explored herein. Accordingly, we need not decide now whether the rule might also protect Williams from reparations for the period from 1972 until the issuance of this decision. That possibility arises because, as the ICC recognized, *see* text accompanying note 29 *supra*, Williams' actions in this case have partaken (to an unspecified degree) of a justifiable reliance on ICC precedents from the 1940's, and especially on language in its 1971 *Uniform System of Accounts* order that support a valuation rate base, an 8-10% rate of return, and a purchase-price depreciation basis. Although these sources may embody questionable notions about ratemaking, they do represent the expectations of the ICC concerning future rate activity and, as such, may be seen as binding on a regulatee within the ICC's authority until they are publicly revised. *Cf.* Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 311-12 (1935).

of these three questions might change significantly on remand, so that any examination by us would be premature. Accordingly, FERC should also fully reconsider the section 3(1) issue.[36]

III

Petitioners also challenge the joint rates filed by Explorer and Williams, claiming that they work an illegal discrimination under section 2 of the Interstate Commerce Act, 49 U.S.C. §2. Section 2 prohibits a carrier from granting a special rate or rebate to any shipper. *See* note 7 *supra*. The aim of this provision is to prevent personal favoritism from affecting rates. *See Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 478 (1911); *Wright v. United States*, 167 U.S. 512, 518 (1897).

[36] In addition to examining this issue in light of whatever new evidence it develops, FERC should pay special attention to three questions that appear to us to be central to the §3(1) determination. First, is the ICC correct in assuming that even if a disparity between local and through rates exists and destroys some of petitioners' geographical advantage over the Gulf Coast shippers, petitioners' partial retention of that advantage forestalls any finding of competitive injury? *Williams I*, *supra*, 351 I.C.C. at 119-20. Is that assumption correct even if the advantage retained is solely one in transportation costs but not one in net drilling-plus-refining-plus-transportation costs—*i.e.*, even if, overall, petitioners' products end up costing more than those originating in the Gulf Coast area? *Cf.* A. Lindberg & Sons, Inc. v. United States, 408 F. Supp. 1032, 1037-38 (W.D. Mich. 1976); Chicago & E. Ill. R.R. Co. v. United States, *supra*, 384 F. Supp. at 301 (both cases suggesting that *any* showing of (a) actual competition between the parties subject to the rate disparity, and of (b) some effect on that competitive situation caused by the disparity, will suffice). Second, does petitioners' showing that the ratio of rates to cost for transporting local products under the local rates was much higher than that same ratio for through products under the joint rates belie the existence of "transporation conditions" that justify the disparity between local and through rates? Finally, does the decision in Texas & Pac. Ry. v. United States, 289 U.S. 627 649-55 (1933), protect Williams and Explorer from liability in this case because of their inability to control the other's rates? *Cf.* Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949); New York v. United States, 331 U.S. 284 (1947).

Section 2 normally requires proof that despite a like kind of traffic moving under substantially similar circumstances, two shippers are being charged different prices. It has been accepted for at least ninety years that proof that a carrier charges shippers less for through goods than for those moving locally does not, without more, establish a violation of section 2. *E.g.*, *Union Pac. R.R. Co. v. United States*, 117 U.S. (1886); *Texas & Pac. Ry. Co. v. ICC*, 162 U.S. 197 (1896). Hence, petitioners cannot rest on proof that the joint Explorer-Williams rates are lower than the combination of their local rates.

Beyond introducing such clearly insufficient proof, petitioners note that together the bulk of the Gulf Coast shippers served by the Explorer-Williams interconnection *own* Explorer. Petitioners attempt to turn this affiliation into a rebate by challenging the division of rates between the two intervenors. They argue that by taking less than its due, Williams has left more to Explorer and to its shipper-owners (through dividends) than is their due, and accordingly has rebated some of the rates that Williams otherwise would have collected. Petitioners support this allegation with evidence allegedly showing that under the Explorer-Williams division of the joint rates Explorer receives the same price for transporting through oil as it does for transporting local oil under its individual rates, while Williams allegedly receives 9.5 cents per barrel less for through oil transported under the joint rates than it does for local oil transported over the same route under its individual rates. Thus, it is argued, Williams bore the full brunt of the "shrinkage" in through rates vis-a-vis the combined local rates, instead of dividing that shrinkage equally with Explorer.

Although dicta in Supreme Court cases suggest that divisions of rates between carriers is a matter between themselves, leaving shippers without standing to chal-

lenge them before the ICC,[37] there also exist precedents for the view that unequal divisions of rates in situations involving *shipper-owned* carriers can result in rebates to the controlling shippers that are illegal under section 2. *The Tap Line Cases*, 234 U.S. 1, 28-29 (1914) (dicta); *see Divisions Received by Brimstone R.R. & Canal Co.*, 68 I.C.C. 375, 386-88 (1922), *rev'd on other grounds, Brimstone R.R. & Canal Co. v. United States*, 276 U.S. 104 (1928).

Unfortunately, petitioners did not discover these latter precedents and mold them into a coherent argument until they filed their reply brief in this court. Reply Brief of Petitioners, at 20-22; *cf.* Brief of Petitioners, at 44; JA at 1526-32; 3789-95; 1703-08, 1891-92. To the extent that petitioners' somewhat muddled arguments before the ICC implied that Williams' joint rates were "a clear revenue drain" on Williams and thus unreasonably low under section 1(5), JA at 1528, the ICC found otherwise and petitioners have not appealed that finding before us. To the extent that petitioners appeared to be arguing "that the lesser combination rate is, itself, a form of discrimination exercised by" Williams, JA at 1527, they appeared merely to be repeating their argument under section 3(1) that the combination rates were preferential to Gulf Coast shippers and prejudicial to themselves. Hence, while we do not necessarily agree with the administrative law judge that whether "one carrier (public- or shipper-owned) is shortchanged in divisions with another carrier (public- or shipper-owned) is a matter... between the carriers [and one that is] foreign to the issue whether the joint rates... are discriminatory," we do agree that in *this case* the issue was not properly raised.[38] Accordingly, the ICC is affirmed on this issue.

[37] Great No. Ry. Co. v. Sullivan, 294 U.S. 458, 463 (1935); Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 234 (1925).

[38] *Initial Decision*, *supra*, JA at 1594; *see id.* at 1592-94; 1605. In the two Supreme Court precedents relied upon by the administrative law judge for the proposition that "division of a joint rate is a matter of no concern to a shipper," *id.* at 1592; *see* note 37 *supra*, no shipper-owned carrier was involved. In both cases, shippers challenged joint rates as unreasonable under §1, and the division of the rates had no impact on their overall reasonableness, as the Court noted in both cases. Great No. Ry. Co. v. Sullivan, *supra*, 294 U.S. at 463; Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co., *supra*, 269 U.S. at 234. Hence, they do not appear to disapprove of the dicta in *The Tap Line Cases*, *supra*, 234 U.S. at 28-29, suggesting that, in a case under §2 in which shipper ownership of a carrier is relevant to the existence of discrimination, the division of joint rates may be a matter of importance to the allegedly injured shippers. The ICC, in fact, has allowed a shipper to intervene in a division-of-rates case on precisely this theory. Divisions Received by Brimstone R.R. & Canal Co., 68 I.C.C. 375, 376 (1922), *rev'd on other grounds*, Brimstone R.R. & Canal Co. v. United States, 276 U.S. 104 (1928). *See id.* at 386, *citing The Tap Line Cases*, *supra*.

In reviewing the ICC's *Brimstone* decision, however, the Supreme Court did conclude that the ICC had no authority to order the retrospective redivision of joint rates; the Commission's authority with respect to rate divisions, derived from 49 U.S.C. §15(6)(a), *as amended*, Pub. L. 94-210, §201, 90 Stat. 34 (1976), is entirely prospective. Brimstone R.R. Co. v. United States, 276 U.S. 104, 121-23 (1928); *see* Baltimore & Ohio R.R. Co. v. Alabama Great So. R.R. Co., 506 F.2d 1265, 1268-69 (D.C. Cir. 1974). Consequently, by affirming the Commision on the ground that petitioners failed properly to raise this issue before the ICC, we have not foreclosed them from raising it again before the ICC's successor (FERC) and from receiving precisely the prospective redress to which they would potentially be entitled were we instead to remand. Williams, of course, would be free at that time to interpose the defense that whatever special treatment was accorded Explorer's owners was required by the need to meet competition from Explorer and other carriers. *See, e.g.*, McGraw Elec. Co. v. United States, 120 F. Supp. 354, 361-62 (E.D. Mo.) (three-judge court), *aff'd mem.*, 348 U.S. 804 (1954); JA at 1888, 2574.

The case is remanded to FERC for determination by it of whether Williams' rates are reasonable and whether those rates in relation to the combined Williams-Explorer rates create an illegal preference. In other respects, the decision of the ICC is affirmed.

It is so ordered.

Served November 5, 1975

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INTERSTATE COMMERCE COMMISSION

No. 35533

PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY

No. 35533[1]

PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY

Decided October 10, 1975

1. In docket No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2), increased pipeline rates on petroleum products from and to points in the Southwest and Midwest found just and reasonable and otherwise lawful. Proceedings discontinued.
2. In fourth-section application No. 42327, authority granted to establish and maintain the increased pipeline rates on petroleum products from certain points in New Mexico, Texas, Oklahoma, and Kansas to certain points in Illinois, Iowa, and Missouri without observing the long-and-short-haul provisions of the Interstate Commerce Act.
3. In docket No. 35540, initial pipeline joint rates on petroleum products from Lake Charles, La., and Port Arthur, and Pasadena, Tex., to points in the Midwest found not shown to be unjust and unreasonable and otherwise unlawful. Proceeding discontinued.
4. In docket No. 35720, assailed pipeline rates on petroleum products from and to points in the Southwest and

[1] Also embraces docket Nos. 35533 (Sub-No. 1), Petroleum Products to Ill., Iowa, and Mo., Williams Brothers Pipe Line Company, No. 35533 (Sub-No. 2), Petroleum Products, Williams Brothers Pipe Line Company, No. 35540, Petroleum Products, Louisiana & Texas to Midwest, fourth-section application No. 42327, Pipeline Rates—Petroleum Products from the Southwest, and Docket No. 35720, American Petrofina Company of Texas, et al. v. Williams Brothers Pipe Line Company, et al.

Midwest found not shown to be unjust and unreasonable and otherwise unlawful. Complaint dismissed.

Robert G. Bleakney, Jr., *Robert L. Calhoun*, *John S. Estill, Jr.*, and *David M. Schwartz* for a respondent in docket Nos. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35440, for applicant in fourth-section application No. 42327, and for a defendant in docket No. 35720.

Donald W. Markham and *Howard D. McCloud* for a respondent in docket No. 35440 and a defendant in docket No. 35720.

John McCleary, *John F. Donelan*, and *Frederic L. Wood* for protestants in docket Nos. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), fourth-section application No. 42327, and docket No. 35440 and for complainants in docket No. 35720.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS BROWN, HARDIN, AND CORBER

BROWN, *Commissioner:*

By schedules filed to become effective December 26, 1971, in docket No. 35533, January 27, 1972, in docket No. 35533 (Sub-No. 1), and March 25, 1972[2] in docket No. 35533 (Sub-No. 2), respondent, Williams Brothers Pipe Line Company (WBPL) proposed to establish increased pipeline local rates and in connection with certain pipeline carriers increased pipeline joint rates on petroleum products, from and to certain points in the Southwest and Midwest. Upon joint protest filed by certain shippers[3]

[2] Postponed from March 1, 1972.

[3] American Petrofina Company of Texas, Bell Oil & Gas Company, Farmers Union Central Exchange, Inc., Farmland Industries, Inc., CRA, Inc., Kerr-McGee Corporation, Midland Cooperatives, Inc., National Cooperative Refinery Association, and OKC Corporation.

(Shipper Group) the investigations in docket Nos. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2) were instituted on December 23, 1971, January 24, 1972, and March 7, 1972, respectively, concerning the lawfulness of the schedules which became effective on December 26, 1971, January 27, 1972, and March 25, 1972, also respectively.

By fourth-section application No. 42327, WBPL seeks authority to establish and maintain the rates under investigation in docket No. 35533 (Sub-No. 1) without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act.

In docket No. 35540, by schedules filed to become effective January 8, 1972, respondent Explorer Pipeline Company (Explorer) and WBPL proposed to establish initial pipeline joint rates on petroleum products, from Lake Charles, La., and Port Arthur, and Pasadena, Tex., on the lines of Explorer to certain points in the Midwest on the lines of WBPL. Upon joint protest of the Shipper Group this proceeding was instituted on January 7, 1972, into and concerning the lawfulness of the schedules which became effective on January 8, 1972.

In docket No. 35720, by joint complaint filed August 23, 1972, the complainants, Shipper Group, allege that the pipeline rates charged on petroleum products to points in the Midwest by defendant WBPL from points in Oklahoma, Kansas, Nebraska, and Minnesota, and by defendants Explorer and WBPL from Lake Charles, Port Arthur, and Pasadena, were and are unjust and unreasonable, unjustly discriminatory, and unduly and unreasonably preferential and prejudicial in violation of sections 1(5), 2, and 3(1) of the Interstate Commerce Act. Complainants seek an order requiring defendants to cease and desist from the alleged violations of the act, to establish and maintain just and reasonable rates and charges, and to

pay reparations in excess of $10,000 (approximately $5 million a year since August 20, 1970), plus interest, and costs and reasonable attorneys' fees.

The Administrative Law Judge, in an initial decision served June 6, 1974, found:

(1) That in docket Nos. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2), the increased pipeline rates on petroleum products from and to points in the Southwest and Midwest were just and reasonable and otherwise lawful;

(2) That in fourth-section application No. 42327 authority should be granted to establish and maintain the increased pipeline rates on petroleum products from certain points in New Mexico, Texas, Oklahoma, and Kansas to certain points in Illinois, Iowa, and Missouri without observing the long-and-short-haul provisions of the Interstate Commerce Act;

(3) That in docket No. 35540, the initial pipeline joint rates on petroleum products, from Lake Charles, La., and Port Arthur and Pasadena, Tex., to points in the Midwest had not been shown to be unjust and unreasonable and otherwise unlawful;

(4) That in docket No. 35720, the assailed pipeline rates on petroleum products from and to the Southwest and Midwest had not been shown to be unjust and unreasonable and otherwise unlawful.

Before discussing the exceptions, we adopt the Administrative Law Judge's findings concerning the parties and certain rates issues and we set these out in appendix A.

Exceptions to the initial decision of the Administrative Law Judge were filed by protestants/complainants and they will be discussed hereinafter in detail. Replies to

the exceptions were filed by respondents/defendants. The essence of the replies to the exceptions is that the exceptions are without merit; the rates and earnings of WBPL are not unlawful; and the conclusions and findings of the Administrative Law Judge in his initial decision are correct and should be adopted by the Commission. The replies, accordingly, will not be discussed, in detail except in connection with exception 30.

Before discussing the exceptions individually, we should note the basic areas to which they pertain. The first four exceptions are general ones. Exceptions 5 through 20 and 30 go to the issue of reasonableness. It is alleged that the Administrative Law Judge erred in concluding that the increased pipeline rates from and to points in the Southwest and Midwest were just and reasonable and that the rates brought in issue were not shown to be unjust and unreasonable. Exceptions 21 through 28 deal with the issue of preference and prejudice involving the initial joint pipeline rates of Explorer and WBPL from three gulf coast origins served by Explorer to 45 midwestern destinations served by WBPL. In exception 29, these joints rates are also alleged to be discriminatory.

Exceptions 1, 2, 3, and 4.—Exceptions 1, 2, 3, and 4 are merely general exceptions taken to the ultimate conclusions reached by the Administrative Law Judge in the initial decision. The specific exceptions are discussed in detail hereinafter.

As mentioned above, exceptions 5 through 20 and 30 pertain to the reasonableness of rates. In particular, exceptions 5, 6, and 7 refer to statements found in the Summary and Findings of the initial decision (p. 23), which are alleged to be the only statements that could be arguably aimed at supporting the ultimate conclusions of reasonableness.

Exception 5.—Protestents/complainants here object to the Administrative Law Judge's finding that "None of the shipper group question WBPL's rate structure."

Our comments.—The shipper group did question the joint WBPL-Explorer rates and argued that these rates were not just and reasonable. This question becomes moot, however, in view of the Administrative Law Judge's finding that the disparity between the level of WBPL's rates and the joint rates is shown to be warranted.

Exception 6.—In this exception, issue is taken to the finding that "There is no legal requirement that the same percentage of profit be secured from each type of operation of a transportation company."

Our comments.—This was based on *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585, 598-99 (1915), and the exception is without merit.

Exception 7.—Protestants/complainants allege that the overall earnings of WBPL are excessive, as shown by use of the capital cost factor of 5.98 percent.

Our comments.—The traditional method of determining the reasonableness of rates for pipeline products is the rate of return on the Commission's validation of pipeline property. The Commission held that a 10-percent rate of return was reasonable.[4] See *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.*, 243 I.C.C. 589 (1941). Based on this standard, the overall earnings of Williams Brothers is clearly not excessive. WBPL's rates of return on valuation are 8.83 and 8.57 percent for 1972 and 1973. See appendix B. It should be noted that the revenues used in these computations reflect the increased rates requested by WBPL. Thus, using Commission precedent the Adminis-

[4] The Commission found that a 8-percent rate of return was reasonable for crude petroleum in *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944).

trative Law Judge's findings regarding the reasonableness of the rates are correct and are hereby affirmed. However, protestants/complainants have in their presentation in this proceeding raised certain considerations pertaining to rate of return of pipelines that have broad implications affecting the entire pipeline industry. Thus, while it is not necessary in this proceeding to resolve these broader issues, the division proposes to recommend to the entire Commission that the Ex Parte No. 308, *Valuation of Common Carrier Pipelines*, be expanded to include the rate of return issue, i.e., whether the 8-percent and 10-percent rate of return on crude petroleum and petroleum products are still the proper measure of reasonableness.

Exception 8.—Protestants/complainants contend that the record fails to support the method or accuracy of the development of the weighted average ratios of rate to cost shown in appendices A and B to the initial decision. Their objection here is that the Administrative Law Judge found these ratios to be "weighted averages," without documented evidence thereof.

Protestants/complainants also state that there was no justification presented in this proceeding for revenues in excess of the overall total cost of service. They also contend that the rates must be reduced by a minimum of 15 percent.

Our comments.—The Administrative Law Judge clearly stated that appendices A and B were WBPL's comparisons of rates to the 1972 cost levels. He also stated that the composite capital cost return percentage of 8.31 percent used in appendix B was inappropriate. It is true that although the sworn testimony of WBPL's witness is entitled to some weight, protestants/complainants should have had access to the figures which would have explained the weighting process. As seen in the discussion of the previous exception, however, there is sufficient evidence to

support the Administrative Law Judge's conclusion that the rates were reasonable. See appendices B.

Exception 9 through 19.—The protestants/complainants contend that the Adminstrative Law Judge committed error in his adoption without critical evaluation, of the Commission's valuation as a fair value rate base. We shall comment on each of these exceptions, but, first, will provide some background on the Commission's valuation method and its use by WBPL in these proceedings.

Prior to purchase by WBPL, the pipeline facilities in question were owned and operated in common carrier service by Great Lakes Pipe Line Company. The date of purchase was March 29, 1966. Subsequent to this acquisition, additional properties were constructed and a delivery terminal purchased from Cometa Corporation at Nebraska City, Nebr.

The investment of WBPL in carrier property, including land and rights-of-way, as of December 31, 1966, was stated in its records as $293,583,099. An audit by the Commission of WBPL's records indicated that after minor adjustments, the proper investment in carrier property should have been $293,389,478. The records examined also indicated that the recorded investment in the carrier property purchased from Great Lakes Pipe Line Company exceeded the original cost by $108,988,501. An audit of Great Lakes Pipe Line Company's records indicated that on the date of sale its investment in carrier property, including land and rights-of-way, was $174,839,059. In other words, WBPL's recorded investment, including land and rights-of-way as of December 31, 1966, amounted to $293.6 million. Of this amount, $283.8 million represented the purchase cost of the Great Lake's properties, and the remaining amount of $9.8 million represented new construction.

Further, the Commission permitted WBPL to record on its books the price actually paid and allowed it to accrue

depreciation expense based on this actual investment. In fact the Commission changed its accounting rules to permit this action. In *Uniform System of Accounts for Pipeline Companies*, 337 I.C.C. 518, 522-523 (1970) the Commission stated:

> ... Pipeline companies may construct or extend facilities at will; no certificate or other franchise is required. They are not monopolistic or free from competition, and we affirm the division's finding that it would be inappropriate to require the purchaser to record depreciable property at its net book value to the seller.
>
> As for ratemaking considerations, the amendments hereinafter set forth will insure that property accounts are not inflated by nondepreciable items. Moreover, we are concerned here with accounting rules which are not necessarily dispositive of the manner in which expenditures will be treated in a proceeding to determine the reasonable level of particular rates. *It should also be noted that rate of return for pipelines is customarily determined, not by investment as shown on the carrier's books, but rather on the basis of the Commission's valuations pursuant to section 19a of the act...* [Emphasis added.]

The critical question in this proceeding resolves down to what is a proper rate base from which one can measure a fair return with respect to pipelines. The protestants/complainants claim that for the purpose of ratemaking and measuring the reasonableness of pipeline rates, the use of an original cost rate base is preferable to the use of any valuation rate base. The respondents/defendants claim they should be treated no differently than other pipelines and the Commission would be correct in using a valuation rate base. However, they concede that if the Commission should consider a net book

cost it should be based on net investment and not on net original cost. The question resolved down to which of three alternative bases, or variations thereof should the Commission give consideration to for the purpose of ratemaking and measuring the reasonableness of pipeline rates: (1) valuation rate base; (2) net investment rate base; or (3) net original cost rate base.

Based on these three alternative methods, the various rate bases for WBPL for the period ending December 31, 1966, would be as follows:

	Million
(1) Valuation[1]	$167.6
(2) Net investment[1]	287.8
(3) Net original cost[2]	101.1

[1] Taken from ICC Valuation Docket No. 1423 (1966 report.)

[2] Estimate based on original cost of $174.8 for property purchased from GLPL less accrued depreciation of $83.4 million plus original cost of $9.7 million for property added after purchase.

It is obvious that neither WBPL nor any prudent party would invest $293.4 million in property that had a rate base of about $100 million. In fact, protestants/complainants' principal witness admitted that WBPL could not service its debt based on a net original cost rate base. Therefore, the net investment cannot be accepted as the rate base. On the other hand, the valuation rate base produces a reasonable base from which to measure rate of return and subsequently the reasonableness of rates. The valuation rate base falls between the net original cost and the net investment bases. The Administrative Law Judge concluded that WBPL's rate base, predicated on the Commission's valuation, was reasonable and an equitable base from which to measure rate of return.

With this background, we will proceed to discuss individually the protestants/complainants' exceptions 9 through 19. These 11 exceptions are to various statements that the Administrative Law Judge made with respect to the admission and use of valuation as a rate base for pipelines.

9. The Administrative Law Judge stated that "The witness making the estimated Commission valuation was fully qualified to do so and his reliance upon Commission reports may not be properly questioned." (Page 10 of the initial decision.)

The protestants/complainants attempted to have the defendants/respondents' principal witness disqualified as an expert witness and consequently his statement and exhibits on the computation of the valutaion rate base for years 1967-1969 and his use of the valuations as found by the Commission for the years 1966, 1970, 1971, 1972 disallowed. Their objections were on both procedural grounds and on the merits as to the validity and weight to be given to such data.

Our comments.—With respect to the exhibits submitted by the defendants/respondents' principal witness, our analysis of the data contained therein shows such data to be acceptable in theory and principle. Although the protestants/complainants state that "The record clearly shows that Mr. Hines was not competent to offer such exhibits," they nevertheless, admit that he testified in a prior proceeding and apparently submitted information predicated on valuation concepts.

10. The Administrative Law Judge stated that "The matter of compliance with the Administrative Procedure Act, 5 U.S.C. Section 553, in the valuation proceedings is not a matter for consideration here, but must be raised in those proceedings." (p.10.)

Protestants/complainants allege that this statement is erroneous as it effects the 1966 docket.

Our comments.—Inasmuch as protestants/complainants made no attempt to protest the 1966 docket, it may not be brought into question at this time.

11. The Administrative Law Judge stated that "The matter of defects in the Commission's Valuation process raised by the shipper group has no place here." (p. 18.)

The protestants/complainants claim the valuations relied upon by WBPL should be rejected because of the numerous defects allegedly existing in the valuation process. The numerous defects refer to the protestants/complainants' theories with respect to the various elements and the weighting used in determining valuations.

Our comments.—(a) A great deal of criticism is directed to the development of *Cost of Reproduction New*, one of the seven elements considered by the Commission in its determination of a valuation. Cost of reproduction new is the estimated cost of reproducing substantially the identical property constructed in a prior period at a price level as of a subsequent date. In all pipeline valuations the Commission uses a base period of 1947 and through the use of indexes estimates the cost of identical property at some later date. As an example, assume that for steel-line pipe of 10-inch diameter the Commission established a 1947 period price of $2.01 per lineal foot. To determine a 1973 period cost for this same pipe, the Commission's index for steel-line pipe would be applied to the 1947 period cost. In this case the 1973 period index would be 225, and, therefore, the 1973 period cost would be 2.25 times the 1947 period cost, or $4.52 per lineal foot.

The principles applied are based on sound engineering techniques recognizing the cost differentials between a predetermined base period and a current period. It

recognizes this through a statistical analysis of changing price patterns and construction techniques and converts these patterns to a statistical index series that measures the deflationary power of the dollars invested in common carrier facilities. These are the same techniques used by economists and statisticians, including the Bureau of Labor Statistics, to measure various changes in costs as shown in their publications. These techniques are also used by appraisers in determining the current market value of land and industrial properties.

As previously stated, this is only one of the elements of costs that would be considered in the determination of a value for this pipe. Its original cost, as well as its estimated cost due to the physical wear and tear that has occurred to the pipe because of use, are also given weight in the determination of its estimated value. Again, assuming certain factors for 10-inch pipe, as cost of reproduction new to be $4.52; original cost to be $3.10; and its physical condition estimated to be 80 percent, which would make its cost of reproduction new less depreciation equal 0.80 x $4.52, or $3.62. Therefore, the Commission's estimated value of this pipe would be based on these three elements.

(b). The protestants/complainants also allege that:

> The basis for estimating the cost of reproduction new is not reliable. First we submit that the whole process has been so tainted by contacts between industry representatives and Commission personnel through the "pipeline advisory committee" which were in essence, ex parte contacts between a select group of industry representatives without notice to the public or participation in the proceedings by rate payers.... *While the Commission might be said to be representing the public, there is no assurance that that was the case.* [Emphasis added.]

The protestants/complainants provide no proof for such accusations. Moreover the pipeline Advisory Committee on Valuation was established in accordance with procedures laid down by law. Its primary purpose is to assist the Commission in obtaining accurate information on current costs of pipeline construction. Since 1973, these meetings have been held with public notice and protestants/complainants attended and participated in at least two of these meetings. Protestants/complainants have always had the opportunity to nominate a representative on the committee but have not elected to do so.

(c). The protestants/complainants state that there is no indication that any prudent man would consider reproducing the WBPL system on the basis of the extremely high reproduction costs estimated. It is not clear what this means. However, it seems to imply that the Commission's valuations are solely a function of reproduction cost new which is not the case. Secondly, if a prudent man wished to construct the pipeline at current year's cost, this would be a fair approximation of what the costs would be.

(d). Other defects in the valuation process alleged by the protestants/complainants include such items as weighting of original cost and reproduction cost, condition percent, going concern value, present value of land, and present value of rights-of-way. These defects are all theory and not fact and are based principally on the grounds that they have the direct effect of increasing the valuation. In answer, we point out that the following:

Original cost and reproduction cost.—The act specifically requires that consideration be given to cost of reproduction new, cost of reproduction new less depreciation, and original cost. Congress did not spell out the weight to be given each of these elements of value but left it to the discretion of the Commission to determine how much weight should be given to each.

Value.—In its determination of value, the Commission first of all has elected to give major consideration to two elements, cost of reproduction new and original cost. The Commission's position has been that the value of the property before depreciation should lie between these two elements of cost, and it elected to weight the two together based on each one's percentage relationship to the sum of the two. In other words, during a period of inflation, cost of reproduction new would naturally be given the greater weighting while during a recession original cost would be given the greater weighting. There are numerous ways in which these two elements could be weighted. However, the Commission considered this to be the most equitable and consequently has used this approach in all of its valuations both for railroads and pipelines.

Condition percent.—In their criticism of the Commission's use of condition percent in lieu of accrued depreciation, it is apparent that the protestants/complainants do not understand the valuation process and what the Commission is attempting to accomplish. The Commission must find a value of the property due to physical wear and tear. Exact engineering measurements could be done to accomplish this; however, the cost would be prohibitive. Therefore, the Commission has elected to measure this physical wear and tear mathematically. This condition percent factor as used by the Commission is a function of the remaining probable life of an item of property at any attained age and its total probable life at that age. The Commission considers the application of this value to the cost of reproduction new, to produce a reasonable estimate of the cost of the property in its present condition.

Going concern value.—In its determination of valuations, the Commission gives consideration to going concern value without showing a definite amount for these intangible values. However, an amount is added for the intangible value of going concern of 6 percent of the

value, before adding an amount for present value of land, present value of rights-of-way, and working capital. This is considered to represent the value of an operating plant as compared to a nonoperating plant, and the amount of investment upon which those devoting property to the public service are fairly entitled to earn the stipulated return.

Present value of land.—The protestants/complainants' objection to use of present value of land has no merit since the act specifically requires that the Commission find and give consideration to its value in the determination of a valuation. Their only argument against its use is that during times of inflation its cost could be greater than the original cost.

All valuation elements.—In Ex Parte No. 308, the Commission will address itself to each of the seven elements it considers in the development of a valuation. These are (1) original cost, (2) cost of reproduction new, (3) cost of reproduction new less depreciation, (4) going concern value, (5) present value of land, (6) present value of rights-of-way, and (7) working capital. Since the Commission applies the same procedures equally to all pipeline carriers under its jurisdiction, there is no reason to single out one carrier and apply different procedures. If the Commission should elect to change its methodology of performing valuations in Ex Parte No. 308, the new methodology will be applied to all carriers equally and on the same basis.

12. The Administrative Law Judge stated that: "The valuation process, pursuant to Section 19a has been employed by the Commission for many years, and on railroad and pipeline valuations has withstood many challenges." (p. 18.)

Our comments.—This is a true statement of fact and is documented in the printed "Valuation Reports" of the

Commission. In the initial valuation of the railroads the Commission made some 1,825 individual carrier valuations. Many of its decisions and the methods employed by it were subjected to challenges. In its initial valuations of pipelines in 1934 there were 82 carriers for which it made valuations, and many of these carriers protested the Commission's findings and challenged its methods of doing valuations.

13. The Administrative Law Judge stated that: "Any question involving the valuation process should be determined in a rulemaking proceeding at which all affected persons are allowed to present their views." (p. 18.)

Our comments.—The protestants/complainants in this proceeding cannot plead ignorance of the Commission's valuation process as most of them are subject to the same section 19a requirement and have been served with valuation reports. Our comments on exception 11, are also applicable here.

The valuation process follows preestablished procedures in other Commission proceedings. In *Ajax Pipe Line Corporation*, 50 Val. Rep. 1 (1949), the Commission set forth its statement of methods for the determination of its valuation for pipelines. Any alternation of this process, must be accomplished through a proceeding dealing with the subject so that all affected parties may be heard. For this reason, Valuation Docket No. 1423 (1971, 1972, and 1973 Reports) were separated from Ex Parte No. 308.

14. The Administrative Law Judge stated that: "The consistent past use of a valuation rate base for oil pipelines was recognized by the Commission in *Uniform System of Accounts for Pipeline Companies.*"

Our comments.—That decision supports the statement of the Administrative Law Judge, as set forth in the background discussion of exceptions 9 through 19, above.

In addition, pipeline valuations are currently being done on an annual basis for all carriers subject to the Commission's jurisdiction. In each valuation docket, the amount found to be the value for ratemaking purposes is stated, and is similar to the one shown below for WBPL:

> Final value for ratemaking purposes of the property of the Williams Brothers Pipe Line Company, owned and used for common carrier purposes, found to be $167,605,000 as of December 31, 1966.

15. The Administrative Law Judge's assertion that the final valuation meets the attributes considered to be desirable for a rate base. (p. 20.)

Our comments.—These attributes are (1) it should be readily determinable as of any date; (2) it should remain stable regardless of fluctuations in construction costs; (3) it should be readily defended as to correctness of amount in court actions; (4) its use should result in reasonably stable rates; (5) it should serve as a guide not only for the determination of rates, but for the issuance of securities and for authorization of purchase and sale of property; and (6) its use should result in justice to both the owner and its shippers. This would be the ideal rate base and we consider that the valuation rate reflects as many of these attributes as any rate base which could be used.

16. The Administrative Law Judge's assertion that "the Commission methodology of determining valuations has withstood the test of time and the challenges of the railroads and the pipelines." (p. 21.)

Our comments—Our comments on exception 12 also apply to this exception.

17. The Administrative Law Judge stated that: "The fair value rate base here meets the end result doctrine of the *Hope Natural Gas* case. (p. 21.)

Our comments—Many have read into the Supreme Court decision in *Hope Natural Gas*, 320 U.S. 591, that the only proper base from which to measure rate of return is a net original cost base, and in the instant proceeding the protestants/complainants are in fact attempting to have this position adopted. However, section 19a of the act has had no material amendments since its enactment on March 1, 1913. Until such time as it is amended, the Commission, in administering the act, must consider all the elements of value detailed in section 19a. Therefore, a carrier may show the value of its property and the rate of return thereon in any ratemaking proceedings before this Commission.

The protestants/complainants contend that this Commission has long ago rejected, for ratemaking purposes, reliance upon principles which are of the essence of the so-called valuations. In support of their argument they point out that in Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I.C.C. 589 (1952), in its report on further hearing, 281 I.C.C. 563, *et. sq.*, the Commission stated that estimates of values of the class I railroad properties should be based upon our estimates of original cost (except land and rights), the present value of lands and rights, and an allowance for working capital less recorded amounts for depreciation and amortization. However, to the contrary, the Commission was there attempting to apply the principles as enumerated in section 19a. At that time it did not have updated valuations for all class I line-haul, switching, and terminal railroads, nor did it have the personnel to compile the valuations. Regardless, it did not elect to use the single element of value (net original cost) in its determination of proper rates.

18. The finding by the Administrative Law Judge that the "best measurement of the reasonableness of the rates" consists of a capital cost factor "applied on the *fair value rate base*." (p. 22.) [Emphasis added.]

Our comments.—Our comments on exception 7 also apply to this exception.

19. The Administrative Law Judge's characterization of "final value" figures which have not been the subject of a final valuation in accordance with proper procedures under the Administrative Procedure Act. (p. 20.)

Our comments.—The Commission issues a tentative report in which it refers to the single-sum value that it finds as "final value for ratemaking purposes." (See exception 14 above.) By provision of section 19a(h), the tentative valuation report becomes final if no protest is filed within the time allowed by statute. The history of the various valuation reports for WBPL (Valuation Docket No. 1423-1966 through 1973) is as follows:

The Commission served its tentative valuation report (Valuation Docket No. 1423-1966 Report) for WBPL on September 29, 1970. There were no protests to the tentative report and it became final on November 9, 1970.

The Commission did not prepare tentative valuation reports for WBPL for the years 1967, 1968, and 1969. However, it did prepare a report as of December 31, 1970, which included all of the changes to the physical properties that had occurred during the years 1967 through 1970. A tentative valuation report (Valuation Docket No. 1423-1970 Report) was served on November 21, 1972. On December 22, 1972, a protest was filed by the protestants/complainants against the tentative valuation report. The Commission, Division 2, Acting as an Appellate Division, by its order of March 13, 1973, rejected the protest on the basis that only parties entitled under section 19a(h) of the act to be served by the Commission with notice of tentative valuations are authorized to file protests against the findings in the tentative valuation report. On April 19, 1973, a notice was served on all

parties stating that report of the Commission and the valuation found therein was final.

The Commission on August 1, 1973, served its 1971 tentative valuation report (Valuation Docket No. 1423-1971 Report); on May 3, 1974, its 1972 tentative valuation report (Valuation Docket No. 1423-1972 Report); and on December 18, 1974, its 1973 tentative valuation report (Valuation Docket No. 1423-1973 Report). The protestants/complainants filed a petition for leave to intervene in all three proceedings. Their petitions were granted[5] and they filed protests.

The Commission on August 1, 1973, served its 1971 tentative valuation report (Valuation Docket No. 1423-1971 Report); on May 3, 1974, its 1972 tentative valuation report (Valuation Docket No. 1423-1972 Report); and on December 18, 1974, its 1973 tentative valuation report (Valuation Docket No. 1423-1973 Report). The protestants/complainants filed a petition for leave to intervene in all three proceedings. Their petitions were granted[5] and they filed protests.

Since the Commission has not disposed of these latter protests the protestants/complainants claim that the single-sum figures in the tentative reports are not "final." The protestants/complainants are dealing in semantics and, as above indicated, regardless of the use of the terminology of "final value" for valuation, the tentative

[5] This was pursuant to order of March 13, 1973, to the effect that: ... in the future, notice be published in the Federal Register that a tentative valuation of a particular carrier's property is under consideration by the Commission; that the notice shall provide that interested parties, pursuant to Rule 72 of the Commission's General Rules of Practice, 49 C.F.R. §1100.72 may file an original and three copies of a petition for leave to intervene and if granted thus come within the category of "additional parties as the Commission may prescribe" under section 19a(h) of the Act thereby enabling the party to file a protest; and that the notice shall further specify the carrier's address so that service of the petition to intervene can be made upon the carrier.

reports do not become final except in compliance with the provisions of section 19a of the act, which are as follows:

> (h) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice ... stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.
>
> (i) If notice of protest is filed the Commission shall fix a time for hearing the same.... If after hearing any protest of such tentative valuation under the provisions of this part the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof....

Therefore, it is clear that the tentative valuation does not become final until the provisions of the statute are complied with.

Exception 20.—The protestants/complainants contend that the Administrative Law Judge "In an attempt to support his erroneous use of the 'valuation rate base' ... relied heavily upon contentions that such a rate base is a workable method for preventing capital exhaustion and for coping with attrition of earnings." They further contend that if any consideration is to be given ... to the concept of 'capital exhaustion' it only would be applicable to the unrecouped balance of the capital *originally* invested ... an amount which, by the time the line was sold by GLPL to WBPL in 1966, amounted to $91,359,860."

Our comments.—The Administrative Law Judge is correct, since a valuation rate base is a workable method for preventing capital exhaustion. This has become clear in recent years due to the spiraling rate of inflation and can be illustrated using the Commission's own series of index numbers for pipeline construction. Using 1947=100, the annual indexes for the past 8 years (1966-1973), the period during which WBPL has been in operation as a common carrier, are as follows:

1973—235	1969—191
1972—221	1968—187
1971—211	1967—181
1970—198	1966—179

This means that for every $1.79 spent for plant in 1966 it would require $2.35 to buy the same equivalent plant in 1973. In other words, at the end of the 8-year period, $1.79 would have been recouped through depreciation charges and would short fall by $0.56 with respect to the amount required to replace the plant. Since a valuation rate base reflects to some degree the inflated cost of plant through the cost of reproduction new value, it consequently helps to prevent capital exhaustion and attrition of earnings.

The issue of preference and prejudice will be discussed in exceptions 21 though 28. This issue involves the initial joint pipeline rates of Explorer and WBPL from three gulf coast origins—Lake Charles, La., Pasedena, Tex., and Port Arthur, Tex.,—to 45 midwestern destinations served by WBPL. It is alleged that the rates are prejudicial to the Midcontinent shippers who use WBPL's rates to these same destinations from Midcontinent origins. At the time of the hearings, the initial joint rates were uniformly 9.5 cents a barrel less than the combination of Explorer's and WBPL's rates, a difference that by subsequent tariff filings has become 6.5 cents a barrel. The Administrative

Law Judge found that the disparity between the level of WBPL's rates and the joint rates did not support a finding of preference and prejudice since WBPL's rates are substantially lower than the joint rates to the same destinations, no competitive advantage accrues to the shippers at the joint rates, and no showing of injury was made.

Exception 21, 22, and 23 shall be considered together and pertain to whether the disparity in rates is justified by transportation conditions.

Exception 21.—The protestants/complainants except to the Administrative Law Judge's statements that Explorer's and WBPL's "operations differ in material respects" and that "the differences account for the maintenance of a lower level of rates by Explorer." The Administrative Law Judge stated that these differences were part of the reason why the Explorer-WBPL joint rates were lower than WBPL's local rates. Protestants/complainants argue that the Administrative Law Judge did not quantify what the differences are.

Exception 22.—The protestants/complainants except to the statement that "the combined Explorer WBPL factors in the making of the joint rates differ from the WBPL factors in the making of the WBPL rates." They argue that the statement is also unquantified.

Exception 23.—The protestants/complainants except to the Administrative Law Judge's justification for the differences in rates based upon "factors other than cost" which factors "include a deterrent[6] to the extension of its pipeline by Explorer, increased load through WBPL's lines tending to reduce WBPL's cost, and water competition." Here, too, they allege that the Administrative Law Judge did not quantify these differences.

[6] Misspelled as "determent" in the initial decision.

Our comments.—Protestants/complainants concede in their brief on exceptions that there are some differences between Explorer's and WBPL's operations, although these differences do not justify the magnitude of the rate disparity. We believe they do.

Explorer has a large (28") diameter, fully automated pipeline which results in significant cost savings when compared to WBPL's smaller and older lines. Even though Explorer's volume is currently well below the level required for optimum operating efficiency, there is evidence of record that even at this level Explorer's system operating costs for the year 1972 were significantly lower than WBPL's (46.74 cents per 1,000 barrels-miles versus 55.59 cents). At optimum capacity the unit cost of transportation through the 28-inch line will be less than half the cost of transportation through the 12-inch line. Furthermore, the threat of competitive entry by new pipelines and water carriers were an important consideration in determining the level of rates. Finally, the joint rates were established to aid in providing new markets for gulf coast origin products and will help in meeting the increased demand for petroleum products which the midcontinent shippers cannot meet because crude oil production there has not kept pace with demand and there has been a decline in refinery capacity. (Docket No. 35720, Ex. 58, p 7.)

Exceptions 24, 25, and 28 shall be considered together.

Exception 24.—Protestants/complainants except to the Administrative Law Judge's finding that "the Shipper Group [protestants/complainants] continues to enjoy a substantial rate advantage over gulf refineries to points served by WBPL."

Exception 25.—Protestants/complainants except to the Administrative Law Judge's finding that "the contentions of the Shipper Group to the contrary notwithstanding, the shippers in the Shipper Group have not been affected by the joint rates."

Exception 28.—Protestants/complainants except to the finding that "no competitive advantage accrues to shippers at the joint rate and no showing of injury is made."

Protestants/complainants allege that they have been and are being injured by the relative disparity in the rate level. By having to pay a greater revenue per mile of transportation, they maintain that they are able to purchase less transportation for a given dollar of expenditures than purchased by their gulf coast competitors under the joint-line rates.

Our comments.—The Administrative Law Judge was correct in finding that the protestants/complainants have not met their burden in showing that they have suffered injury. Standing by itself, their claim that they have to pay greater revenue per mile of transportation and thus are able to purchase less transportation for a given dollar of transportation is too vague. It is clear that protestants/complainants have shipped substantially the same volume of petroleum products under the local rates as prior to the establishment of the joint-line rates. This fact is conceded by protestants/complainants, on page 62 of their exceptions, that they

> . . . have substantially the same volume of petroleum products to the points served by WBPL in 1971 and 1972. . . .

Finally, the disparity in rates favors the protestants/complainants. Gulf coast shippers using the joint rates must pay from 13.5 to 15.5 cents (now 21.5 to 23.5 cents due to subsequent tariff filings) per barrel more than do the midcontinent shippers in order to ship petroleum products to the same destinations with the result that

protestants/complainants still have a substantial advantage in transportation costs.

Exception 26.—Exception is taken to the Administrative Law Judge's statement that "in the present energy crisis even a claim of competition by refiners would be ludicrous." Protestants/complainants allege that this statement is without foundation in the record and that, instead the record shows intense competition among all refiners.

Our comments.—We agree with the protestants/complainants that there is evidence in the record that shows competition among refiners.

Exception 27.—Exception is taken to the summary finding that "the disparity between the level of WBPL's rates and the joint rates is shown to be warranted and does not support a finding of preference and prejudice."

Protestants/complainants' evidence consists of the local rates on refined petroleum products from the representative refining point of Tulsa, Okla., to Midwest destinations, in comparison with the joint through rates on petroleum products from gulf coast refineries through the interchange point of Tulsa, to the same Midwest destinations. The joint rates were as much as 15 cents per barrel higher than the local rates depending upon the origin of the joint rates. However, if the combination of inbound local on crude petroleum of 25 cents a barrel to Tulsa, plus the outbound local on the petroleum products is compared, then the combination of locals is 9.5 cents (now 6.5 cents due to subsequent tariff filings) per barrel higher than the joint rate. Protestants/complainants make the following comparisons in attempting to show that they have been unduly prejudiced:

1. *Revenue per barrel mile*—a gulf origin compared with Midcontinent Group III origins.

2. *Rates to costs ratios*—ratios of WBPL local rates to movement costs from Tulsa compared with ratios of joint WBPL-Explorer rates to joint-movement costs from certain gulf origins.

3. *Rates to costs ratios*—ratios of WBPL local rates to total cost from Tulsa compared with ratios of joint WBPL-Explorer rates to total joint costs from certain gulf origins.

Our comments.—To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. *Chicago Board of Tradé* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830-1 (1973); *Big River Industries, Inc.* v. *Aberdeen & R.R. Co.*, 329 I.C.C. 539.

The Commission has stated: "The principle that differences in rates alone do not establish undue preference and prejudice is too well known to require extended discussion." *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S.F. Ry.*, 321 I.C.C. 519, 553 (1964). There is no legal requirement under the act that a carrier maintain all of its rates on the same per-mile basis or that joint rates equal the combination of the local rates. *St. Louis Southwestern Ry.* v. *United States*, 243 U.S. 136, 139-40.

The protestants/complainants have not shown that they have been competitively injured; furthermore, the rate disparity has been shown to be justified by transportation conditions.

Furthermore, there is no section 3(1) violation, because the protestants/complainants have not shown the common control element. As the Supreme Court stated in

Texas & Pac. Ry. v. *United States*, 289 U.S. 627, 650 (1933), in order to have a violation of section 3(1), the carrier or carriers involved:

> . . . must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under §3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. . . . The situation must be such that the carrier or carriers if given an option have an actual alternative.

Protestants/complainants simply state that such control is "obvious" because WBPL participates in both the local and joint rates. But this fact, however, does not constitute the control element according to the *Texas & Pacific* case. Neither WBPL or Explorer controls both sets of rates. WBPL controls its own local rates, but it does not control the joint rates: to raise the joint rates would require the concurrence of Explorer. Its only effect over the joint rates would be to withdraw from the agreement and cancel the rates. Hence, in this instance, the same carrier or carriers cannot "abate the discrimination by raising one rate [here the joint rates], lowering the other [here the local rates], or altering both."

Finally, protestants/complainants are barred from section 3(1) relief because as the Commission held in *City of Moorhead* v. *Great Northern Ry. Co.*, 172 I.C.C. 38, 43 (1931):

> Fundamentally, undue prejudice can not exist unless the resulting injury will cease upon removal of the prejudice regardless of the manner of its removal. *Duluth Chamber of Commerce* v. *C., St. P., M. & O. Ry. Co.*, 122 I.C.C. 739, 742. In cases where parity was sought only by reductions, we have regarded the allegations of undue prejudice as withdrawn. *Boise Payette Lumber Co.* v. *A. & S. Ry. Co.*, 146 I.C.C. 457, 462.

Protestants/complainants do not want the joint rate increased; instead, they are seeking only reductions in the WBPL local rates. Thus, under the Commission's holding in *City of Moorhead*, the protestants/complainants charges of a section 3(1) violation must be found to have been withdrawn.

Exception 29.—Protestants/complainants allege that the Administrative Law Judge erred in failing to find that there is discrimination in favor of the shipper-owners of Explorer under the joint line rates. As mentioned above, the joint through rates were 9.5 cents per barrel lower than the compared combination of local rates. Protestants/complainants argue that the 9.5-cent differential on joint rates, as well as certain additional terminal costs on the joint route beyond Tulsa, is absorbed by WBPL. This is allegedly accomplished by giving the shipper-owned Explorer pipeline a greater divisional revenue share than is justified on a pro rata cost basis under joint-line rates.

Our conclusions: The joint rates are already lower than the combinations of local rates and, therefore, there is no differential to be absorbed by the joint-line carriers. Furthermore, a division of joint rates does not have to be based strictly on a pro rata cost basis, and, whatever the divisional basis it is a matter between the carriers. This was emphasized by the Administrative Law Judge on page 18 of his initial decision, as follows:

> *Discrimination.*—The Shipper Group contends that WBPL discriminates against . . . shippers and against nonowners of Explorer in violation of section 2 of the act. The Shipper Group claims that WBPL gives Explorer an advantage by joint rates which are 9.5 cents a barrel lower than the combination rates

and argues that since Explorer is shipper owned, the advantage to Explorer is a discrimination in favor of Explorer's shipper-owners. The wrong prohibited by section 2 is a discrimination between shippers. *Wight* v. *United States*, 167 U.S. 512. Explorer is a separate entity from its shippers. It is a common carrier and its arrangements with WBPL are not matters within the purview of section 2.

Exception No. 30.—Protestants/complainants take exception to certain operating expenses which were considered in determining the reasonableness of the overall rates.

(a) *Litigation expenses.*—The expenses incurred by WBPL during 1972 in connection with this litigation before the Commission, and including the related court proceeding before the District Court in Kansas City in docket No. KC-3513, approximated $200,000.

Protestants/complainants contend it is improper to include the entire amount of rate case litigation expenses for the determination of lawfulness of rates in the year in which they were incurred. It is their contention that these expenses should be amortized over a period of at least 5 years.

Respondents/defendants concede that sometimes in cases involving rate increase proposals of public utilities, the litigation expense is amortized over a period of time, but that the practice is not universal. Even where the expense is amortized, it reflects an attempt to estimate the time between the utility's present rate proceeding and the next one. They contend that in view of the uncertainties of the Nation's economy, the declining trend of WBPL's rate of return, and other imponderables affecting the oil business, such an estimate would be impossible for WBPL to make. Additionally, the entire $200,000 constitutes a relatively small proportion of WBPL's total

operating expenses, which in 1972 were over $32 million, and would have a relatively insignificant impact on its rate of return. In any event, they point out that there is no justification in the record for any disallowance of this expense, in whole or in part.

Our comments.—We agree with respondents/defendants that it would be virtually impossible to estimate the time between the present proceeding and any future proceeding WBPL might be involved in. Furthermore, it would be improper to amortize or disallow any of these litigation expenses since: a portion of these incurred expenses were not specifically related to the instant litigation; there is no substantive evidence on which to base a period of amortization; the expense has not been shown to be excessive; and the amount of expense paid to the same transportation consultant and legal firm in 1973 exceeded the amount paid during 1972.

(b) *Payment to an affiliate.*—Protestants/complainants contend that the $600,000 payment to the Willbros Terminal Company for the lease of tanks at West Tulsa, Okla., should not be allowed as an operating expense in this proceeding because: (1) it constitutes payment to an affiliated company not shown to have been accomplished pursuant to competitive bidding; (2) the use of the tanks is unrelated to the rates at issue in the rate increase cases; and (3) the payments are excessive. They further allege that since all maintenance and operating expenses for these tanks are incurred by WBPL, lease payments are obviously excessive. The lease expense was apparently incurred solely for the purpose of providing service under the joint-line rates, which is not related to the rates charged the Midcontinent or other producers. Finally, protestants/complainants believe that this expense should be totally disallowed because it reflected a reversal of previous tends in the cost per unit of output incurred by WBPL. For a number of years WBPL's cost of service

showed a steady reduction or had at least not stabilized. The reversal of this downward trend in 1972 is highly suspect according to protestants/complainants.

Respondents/defendants state that the tanks in question are used in connection with the performance of joint-line service by WBPL and Explorer. Also, it is pointed out that by having the terminal built by its subsidiary rather than in its own name, WBPL is able to effect a savings in ad valorem taxes of $50,000 per year. Respondents/defendants emphasize that no impropriety in the leasing arrangement has been shown.

Our comments.—While the use of the tanks at West Tulsa may not be related to the rate increases at issue, they are used in connection with the performance of joint-line service by WBPL and Explorer. It would be more desirable to have a separation of WBPL's operating costs by districts and between terminal and line-haul. However, such a separation was not made and protestants/complainants did not object to respondents/defendants' barrel-mile method of applying costs. In the absence of such a separation of all of the operating expenses, it would be inappropriate to disallow this expense from the system-average cost of service solely on the ground that the tanks in question are not used by one group of shippers. Finally, the protestants/complainants' allegation that the lease payments are excessive is unsupported by any factual data.

(c) *Payments to parent company.*—WBPL is a wholly owned subsidiary of the Williams Brothers Company to which during 1972 WBPL paid $626,147 for "administrative services" (computers, management services, use of airplanes, et cetera). This was an increase from $595,570 in 1971, and the justification was that the cost of services rendered by the parent company had increased. According to protestants/complainants, allowable expenses for

this item should not include what would appear to be profits to the parent. For example, the parent reported that its costs and operating expenses were 70.8 percent of sales and service revenues. Therefore, WBPL's claimed expense for "administrative services" in the form of payments to its parent company should be reduced by at least 30 percent.

Respondents/defendants again point out that protestants/complainants have not supported their allegations with proof and, therefore, these payments to the parent company may properly be included by WBPL as expenses.

Our comments.—Protestants/complainants allegation is mainly to the effect that the increase in payment to the parent company from 1971 to 1972 was unusual and, therefore, excessive. In fact, payments to the parent have increased every year since 1966, and the increase in payment from 1970 to 1971 was almost three times the amount from 1971 to 1972; the latter payment representing an increase of only 5 percent. In summary, protestants/complainants have not shown that this payment is excessive for the services provided, nor that the Williams Company is earning excessive profits by providing these services for WBPL. Therefore, there is no justification on this record for disallowing any portion of this expense.

(d) *Depreciation.*—Protestants/complainants submit that annual accruals for depreciation should be premised upon an original cost, not the purchase price. They contend that if the purchase price is used as a depreciation base for the recovery of the investment from ratepayers, through the charging of a depreciation expense as a part of the cost of service, the ratepayers would have to provide revenues for depreciation expense in the amount of $287.4 million (the purchase price in 1966) plus the $91,359,860 of previously accrued depreciation on the books of the predecessor company.

Respondents/defendants emphasize that WBPL's depreciation expenses are based upon its actual investment in depreciable property. They claim that having paid a price for the property which no one on this record claims to be imprudent, WBPL should be allowed to reflect its depreciation expense based upon its actual investment. They rely on the first paragraph set forth above from *Uniform System of Accounts for Pipeline Companies, supra,* in connection with the background discussion of exceptions 9 through 19, especially that:

> It would be inappropriate to require the purchaser to record depreciable property at its net book value to the seller. (337 I.C.C. 518, 522.)

On this basis, respondents/defendants argue that it would be improper to deny WBPL the right to recover its actual depreciation expenses where its actual investment has not been shown to be unreasonable.

Our comments.—We agree with respondents/defendants that use of the original cost to determine the annual accruals for depreciation would, in the case of WBPL, be improper. This approach would ignore the actual investment in the pipeline by its current owners as established by this Commission. The basis for WBPL's actual investment in depreciable property has already been established by the Commission's Order in *Uniform System of Accounts for Pipeline Companies, supra.*

(e) *Income taxes.*—WBPL projected several alternative methods of computing taxes as an element in operating costs, including taxes incurred during a given year but deferred. In this regard, protestants/complainants allege that only the taxes actually paid should be allowed as a cost of doing business chargeable to the ratepayers, since there is no cost until such taxes are actually paid. This would not include deferred taxes which are saved and not paid.

Respondents/defendants state that WBPL's predecessor, Great Lakes Pipeline Company, had none of the beneficial tax consequences of WBPL from their purchase price, and paid a high tax rate over the 5 calendar years prior to the purchase ranging up to 50 percent. WBPL's deferred taxes must be paid eventually and it commenced paying substantial Federal income taxes in 1972. Because of the unique considerations in this case, respondents/defendants contend that the use of a statutory Federal income tax rate for measuring WBPL's earnings is the only fair approach, regardless of deferral of certain taxes.

Our Comments.—We agree with respondents/defendants that the use of a statutory Federal income tax rate is appropriate in computing the rate of return on valuation in this proceeding, and this statutory tax rate has been applied in appendix B. However, if Ex Parte No. 308 is broadened, as heretofore discussed, all parties will have an opportunity to present their views on the issue of the most appropriate tax rate (i.e., statutory, actual, or some other method such as actual plus an allowance for deferred taxes) for use in computing the rate of return.

Ultimate Findings

In summary, we find the exceptions, on the whole, to be without merit and we adopt the findings of the Administrative Law Judge. Thus, we find that in docket No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2) the rates are just and reasonable and otherwise lawful; in fourth-section application No. 42327 authority be granted to establish and maintain increased rates without observing the long-and-short-haul provisions of the Interstate Commerce Act; in docket Nos. 35540 and 35720 the rates are not shown to be unjust and unreasonable and otherwise unlawful.

COMMISSIONER CORBER, dissenting:

In my view a convincing case has not been made that the rates of WBPL are just and reasonable. In addition, I would institute an investigation broader in scope than that contemplated by the expansion of Ex Parte No. 308, Valuation of Common Carrier Pipelines.

Reasonableness of WBPL Rates

The traditional criteria of proper ratemaking have always borne a strong resemblance to the criteria of the competitive market. That is, since marketplace competition has been found to be ineffective against monopoly pricing by common carriers, regulation has attempted to approximate the economic benefits of competition when determining a proper level of rates. The principal benchmark for "just and reasonable" rate levels has been cost of production, including the necessary return to capital.[1]

The theoretical ratemaking goal has been found to be unattainable in practice for modes other than pipelines. The carriers and the Commission have found that rates at a full-cost level will effectively embargo movement of certain commodities. As a consequence, the Commission has not interfered with some rates set below a full-cost level in order to facilitate the free flow of interstate commerce and some rates set above full cost (to assure the compensativeness of carrier operations). This ratemaking flexibility has become familiarly known as the zone of reasonableness.[2]

[1] A. KAHN, THE ECONOMICS OF REGULATION 63 (1970). In traditional economic terms, pure competition will produce prices (rates) at a level equal to shortrun marginal or incremental cost.

[2] See *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 814 (1973); *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506 (1935).

The rationale which justifies departure from the ideal of rate levels approximating those existing under competitive conditions, however, has no logical applicability to pipeline carriers in the normal situation. Whereas other carriers transport a variety of commodities, pipeline carriers are essentially single-product carriers. For example, in 1974 the transportation of petroleum products accounted for 97.3 percent of the total barrels transported by WBPL and 98.7 percent of its total operating revenue.[3] Therefore, carrier rate levels. as reflected in carrier revenue, departing significantly from a total cost basis are not justified.

Previous Commission cases support the close correlation between pipeline rates and total cost of service. In *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940), the Commission found the rates of 21 pipeline respondents to be unjust and unreasonable based on a comparison of carrier revenues with carrier costs, including an 8-percent return on value.

In *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944), the Commission found certain pipeline rates to be unjust and unreasonable. The Commission stated, "[W]e conclude that just and reasonable rates on this [pipeline] traffic are rates based substantially on the cost of service . . . and fair return on value."[4]

The majority accepts the principal that operating expenses plus cost of capital identify a reasonable rate

[3] These statistics were obtained from WBPL's 1974 Annual Report to the Commission. The actual figures are:

	Crude	Products	Total
Barrels transported	4,585,222	166,403,882	170,989,104
revenue	$879,574	$67,410,076	$68,289,650

[4] 258 I.C.C. at 57.

level, and then applies that principle in appendix B. I cannot accept those calculations for the following reasons:

1. The majority uses the Commission's tentative valuations for the years 1972 and 1973 as the fair value rate base. Section 19a(i) of the act accords prima facie validity to all final valuations in all proceedings under the act. Tentative valuations, however, are accorded no special status and must be proved on the record before they can be accepted. No party presented any evidence to support the tentative valuations, nor indeed did any party challenge the valuation which the Administrative Law Judge employed. Therefore, I must conclude that an element crucial to the majority's conclusion that WBPL's rates are reasonable is not supported by substantial evidence.

2. The valuation on which the majority relies includes the value of property which WBPL uses but does not own. At the same time, the operating expenses include rental payments on this property. The reason why the valuation is used as a rate base is to enable the Commission to assure a fair return on carrier investment. However, the carrier has no investment in rental property. Therefore, the majority permits a return on property which WBPL does not in fact own.

3. My colleagues calculate WBPL's rate of return using the statutory income tax rate rather than income taxes actually paid.[5] In Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*,[6] The Commission rejected the use of the deferred method of income tax accounting in determining carrier revenue need. Ex Parte No. MC-82 explicitly relies upon *Accounting for Federal Income Taxes*[7] in which the Commission stated,

[5] Income taxes at the statutory level were $6,961,854 in 1972, and $7,667,142 in 1973. Income taxes actually paid were $2,062,000 in 1972, and $3,079,375 in 1973.

[6] 351 I.C.C. 1, 51-52 (1975); 339 I.C.C. 324, 339 (1971).

[7] 318 I.C.C. 803, 807 (1963).

"The present day shipper should not be required to provide from current freight rates for possible increased taxes of the indefinite future." The difference between actual and statutory taxes is far from insignificant, representing over 24 percent of income after taxes in 1972, and over 22 percent of income after taxes in 1973. I believe that actual taxes should be used in calculating WBPL's rate of return.

4. The carrier's revenue in appendix B has been reduced by the amount of "Incidental revenue" listed under Operating Revenue Accounts in WBPL's annual report. No reason is given for this reduction, and I see no basis for assuming that this revenue is not derived from property the value of which is part of the rate base.

Table I below shows the calculation of a maximum reasonable rate level based on a 10-percent return on value found reasonable in *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.*[8] The 1972 valuation in table I is that supported by the record, used by the Administrative Law Judge, and accepted by the parties. No evidence was presented establishing a valuation for 1973; however I will accept *arguendo* the 4-percent increase in the valuation reflected in the majority's figures. Thus, my 1973 valuation is $233,883,520. The taxes shown in table I are the actual income taxes paid in 1972 and 1973. Finally, revenue has not been reduced by the amount of "Incidental revenues."

[8] 243 I.C.C. 589 (1941).

TABLE I

	1972	1973
Valuation	$224,888,000	$223,883,520
Operating expenses	32,754,442	34,651,281
Taxes	2,062,000	3,079,375
Revenues	60,523,560	63,309,474
Income after taxes	25,707,118	25,578,818
Rate of return on valuation—(percent)	11.4	10.9
Return at 10-percent valuation	22,488,800	23,388,352
Excess revenue	3,218,318	2,190,466

It should be noted that the Administrative Law Judge did not use a 10-percent return on value to measure the cost of capital. Instead, he used a 5.98-percent capital cost factor applied to the fair value rate base. Even WBPL did not argue for a rate return as high as 10 percent on value; the carrier computed its cost using capital cost factors of 8.13 and 8.31 percent for 1971 and 1972, respectively. Tables II and III below show the carrier's actual rates of return on valuation for 1972 and 1973 compared with the rates of return which the Administrative Law Judge and WBPL, respectively, contended were reasonable.

TABLE II

	1972	1973
Income after taxes	$25,707,118	$25,578,818
Rate of return on valuation—(percent)	11.4	10.9
Return at 5.98-percent valuation	13,448,302	13,986,234
Excess revenue	12,258,816	11,592,584

TABLE III

	1972	1973
Income after taxes	$25,707,118	$25,578,818
Rate of return on valuation—(percent)	11.4	10.9
Return at 8.13-percent valuation	18,283,394	—
Return at 8.31-percent valuation	—	19,435,721
Excess revenue	7,423,724	6,143,097

Even accepting the most liberal approximation of the cost of capital, the carrier's revenues are shown to exceed a reasonable level.

Pipeline investigation.—In their comments on exception 7, my colleagues propose to expand Ex Parte No. 308, Valuation of Common Carrier Pipelines, to include a determination of a proper rate of return. The suggestion that pipeline structure and practices deserve closer scrutiny is certainly laudable. Nevertheless, the majority's proposal does not go as far as even the limited evidence presently at our disposal seems to warrant.

The majority's proposal assumes that the Commission is wedded to the notion that a reasonable rate of return ought to be determined as a function of the Commission's valuation. Perhaps a better method would calculate reasonableness on the basis of return on shareholders' equity or a combination of such return with costs of debt. Such alternatives should be the subject of further Commission consideration.

The Shipper Group contended that Explorer had entered into joint-rate and divisions agreements with WBPL which favor Explorer's shipper-owners[9] and dis-

[9] The Explorer Pipeline Co. is wholly owned and directly controlled by Toronto Pipe Line Co., Shell Pipe Line Corp., Texaco, Inc., Sun Oil Co. of Pennsylvania, Continental Oil Co., Cities Service Co., Phillips Investment Co., and APCO Oil Corp.

criminate against nonowning shippers. The majority quite correctly rejected the contention that the divisions and joint-rate agreements constituted discrimination for the purposes of section 2 of the act. However, section 11 of the Clayton Act[10] gives jurisdiction to the Commission to enforce compliance, *inter alia*, with section 7[11] of the same act. Section 7 reads, in pertinent part:

> That no corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

If the allegations of the Shipper Group are true, they could constitute evidence that ownership of common carrier pipelines by oil company shippers, upon which the carriers depend so heavily for financial support,[12] gives those shippers an unfair competitive advantage, tending substantially to lessen competition in violation of the Clayton Act. In my opinion, this matter warrants further study in a general investigation.

The Commission has jurisdiction, concurrent with the Justice Department, to enforce the Elkins Act[13] prohibiting a carrier from granting rebates to individual shippers directly or indirectly. A cursory examination of pipeline annual reports for the year 1972 reveals rates of return on shareholders' equity ranging up to more than 200 percent. In many instances these returns accrue to the benefit of shippers. Extraordinary rates of return might, on closer

[10] 15 U.S.C. §21.

[11] 15 U.S.C. §18.

[12] For example, APCO Oil Corp., Cities Service Co., Continental Oil Co., Gulf Oil Corp., Phillips Petroleum Co., Shell Oil Co., Sun Oil Co. of Pennsylvania, and Texaco, Inc., have obligated themselves to Explorer Pipeline Co. in the form of throughput and cash deficiency agreements.

[13] 49 U.S.C. §41 *et seq.*

examination, be found to constitute rebates in violation of the Elkins Act. This matter too deserves closer scrutiny.

Finally, as evidence of the concern shared by the Congress, regarding pipeline practices, I will quote briefly from a Report[14] of the Subcommittee on Special Small Business Problems to the House Select Committee on Small Business, entitled "Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines." The Report reads, in part:

Based on the analysis of testimony, evidence and other available information, the subcommittee makes the following recommendations:

A. That the Interstate Commerce Commission:

(1) Initiate a comprehensive investigation of the structure and operation of joint venture petroleum pipelines in order to determine the extent to which such pipelines operate as true common carriers.

(2) Investigate the possibility of discrimination in pipeline rates by segments with respect to the entire pipeline industry.

(3) Investigate practices regarding the setting of joint through pipeline rates and the resulting legal relations thus created, according particular attention to possible discriminatory practices.

(4) Investigate the failure of joint venture petroleum pipelines to provide common terminal facilities for the use of a shipper, either for input or delivery, in order to determine if such failure constitutes discriminatory conduct.

(5) Investigate the possibility of violations of the merger provisions of section 7 of the Clayton Act by

[14] House Report No. 92-1617.

joint venture petroleum pipelines, utilizing information on file at the Department of Justice.

I agree with the thrust of these recommendations and would institute an investigation of much broader scope than is suggested in the report of the majority.

It is ordered, That the investigation in dockets No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35540, be, and they are hereby, discontinued and that the complaint in docket No. 35720, be and it is hereby dismissed; and that the following fourth-section order No. 20281 is hereby entered:

FOURTH SUPPLEMENTAL FOURTH SECTION ORDER NO. 20281

PIPELINE RATES—PETROLEUM PRODUCTS FROM THE SOUTHWEST

It is further ordered, That fourth-section application No. 42327 be, and it is hereby approved; that the applicants herein be, and they are hereby, authorized to establish and maintain the rates proposed in the application for the transportation of petroleum products over their direct pipeline routes, from and to points named in the application, namely, from certain points in New Mexico, Texas, Oklahoma, and Kansas, to certain points in Illinois, Iowa, and Missouri, and to maintain higher rates to intermediate points; *Provided* that rates from or to such higher rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

By the Commission, Division 2.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A

The parties

WBPL.—WBPL is principally engaged in the transportation of petroleum products. It also handles relatively small volumes of crude oil and liquid fertilizer. The nucleus of its system was constructed in the early 1930's by its predecessor, Great Lakes Pipe Line Company (GLPL), a corporation then owned by eight oil companies. The basic system consisted of 1,238 miles of pipeline extending from refineries at six points in Kansas and Oklahoma to Kansas City, Kans., Des Moines, and Iowa City, Iowa, Omaha, Nebr., Minneapolis, Minn., and Chicago, Ill. Over the years various segments of the original system were looped with one or more parallel lines which could be tied into existing pump station facilities. After World War II a northwest leg, extending from Kansas City to Omaha and on to Grand Forks, N. Dak., was added. In 1965, GLPL had 6,228 miles of pipeline directly connected to 17 refineries and to 14 other pipeline systems. It operated 20 common carrier terminals and connected with 18 shipper-owned terminals. It served 33 shippers and transported 114,884,000 barrels of petroleum products.

WBPL acquired the assets of GLPL on March 29, 1966. By the end of 1971, WBPL had made seven extensions to the system and two additional loop lines, one from Barnsdale, Okla., to Eldorado, Kans., to St. Joseph, Mo., to Des Moines and the other from Des Moines to Mason City, Iowa. At the end of 1971, WBPL had 7,498 miles of pipeline which connected with 14 other pipeline systems. It operated 30 common carrier terminals and connected with 29 shipper-owned terminals. It served 50 shippers and transported 156,846,000 barrels of petroleum products. Additional data concerning WBPL's organization and operations are set forth in Valuation Docket No. 1423, *William Bros. Pipe Line Co., supra.*

Explorer.—Explorer was incorporated on September 27, 1967. It was organized for the purpose of constructing and operating a common carrier pipeline of refined petroleum products from the gulf to Chicago, Ill. Construction commenced in 1970 and was completed in 1972. The first section of the line became operational on October 26, 1971, from Lake Charles, Port Arthur, and Pasadena to Houston, Grapevine, and Irving, Tex. On January 8, 1972, the line was opened to Tulsa permitting inauguration of joint-line service was WBPL. In late May 1972 the final section into Hammond, Ind., was opened and became operational in late June. Construction of four delivery points in St. Louis, Mo., and Peotone, Ill., continued into the second half of 1972. The system became fully operational in late 1972.

Shipper group.—OKC Corporation did not introduce any evidence.

American Petrofina Company of Texas operated three refineries and markets refined petroleum products in 24 States. Its primary use of WBPL is from its refinery at El Dorado, Kans. This refinery has a daily capacity of 22,500 barrels of crude oil. The other refineries at Mount Pleasant and Big Springs, Tex., have daily capacities of 26,500 and 60,000 barrels, respectively. In the period from August 23 through December 31, 1970, it shipped 2,429,427 barrels by WBPL on which it paid charges of $923,210. In 1971 its shipments and charges therefor totaled 7,518,891 barrels and $2,737,077. The 1972 figures are said to approximate 1971 totals.

Bell Oil & Gas Company has merged with Vickers Petroleum Corporation which is owned by Swift and Company. Vickers operates a 30,000-barrels-a-day refinery at Ardmore, Okla. (formerly Bell Oil & Gas refinery), and has about 750 miles of pipeline for gathering crude oil. Refined products are shipped at three-line joint rates from Ardmore via the Bell Oil & Gas Company (a short products line owned by Vickers) to Ardmore Junction,

Okla., thence via ARCO Pipe Line Company to Kansas City, and thence via WBPL to some 30 points on the lines of WBPL. The joint rates are named in ARCO Pipe Line Company Joint Tariff No. 166, I.C.C. No. 124. The joint rates in that tariff are not the matter of investigation or complaint here. Bell Oil & Gas and/or Vickers paid WBPL total transportation charges of $414,827.16 and $1,280,491.87 for the transportation of 756,495 and 2,519,601 barrels of petroleum products, respectively, in the period August 23 through December 31, 1970, and January 1 through December 31, 1971, also respectively. Whether such payments and transportation were covered by the ARCO tariff or the rates at issue here is not a record.

National Cooperative Refinery Association (NCRA) operates a refinery at McPherson, Kans., with a capacity of 45,000 barrels a day. It provides its owner-cooperatives with an organization and operation to supply petroleum products. It distributes its products via WBPL and other pipelines to its owner-cooperatives which then distribute through local cooperatives and ultimately to their individual farm family members. Approximately 30 percent of NCRA is owned by Farmland Industries, approximately 30 percent by Farmers Union Central Exchange, Inc., and approximately 5 percent by Midland Cooperatives, Inc., all of whom are protestants-complainants here. NCRA owns an interest in Jayhawk Pipeline, a crude oil pipeline subject to this Commission's jurisdiction. NCRA paid WBPL total transportation charges of $2,707,348, $5,143,849, and $4,257,607 for the transportation of 5,264,655, 10,079,877, and 7,739,061 barrels, respectively, in the periods, August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through September 30, 1972, also respectively.

CRA, Inc., is a wholly owned subsidiary of Farmland Industries, Inc., with refineries at Coffeyville and Phillips-

burg, Kans. The Coffeyville refinery, with a capacity of 32,500 barrels a day, is connected to WBPL. The Phillipsburg refinery, with a daily capacity of 17,500 barrels, is connected to Kaneb Pipe Line. CRA also has a refinery at Scottsbluff, Nebr., with no pipeline connection. It also operates a pipeline common carrier of crude oil. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through September 30, 1972, CRA paid WBPL $1,689,384, $3,145,403, and $2,075,805, respectively, for the transportation of 4,482,402, 8,353,284, and 6,100,000 barrels.

Farmland Industries, Inc., of Kansas City, Mo., is a regional farmer cooperative owned by approximately 2,000 local farmer cooperatives. It has gross sales of over $750 million annually and net income of over $20 million. It owns about 30 percent of NCRA and wholly owns CRA.

Farmers Union Central Exchange, Inc., of St. Paul, Minn., is a regional farmer cooperative owned by local farmer cooperatives. It has gross annual sales of $250 million and owns about 30 percent of NCRA. It also owns an oil pipeline which until recently was operated as a common carrier subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $165,960, $434,920, and $418,419, respectively, for the transportation of 411,688, 1,141,840, and 1,155,188 barrels of refined petroleum products, also respectively.

Kerr-McGee Corporation, of Oklahoma City, Okla., is a diversified natural resources company. In the production and sale of petroleum products it operates a refinery at Wynnewood, Okla., with a capacity of 33,000 barrels a day. Until recently it also operated a 15,000-barrel-a-day refinery at Cushing, Okla. It owns a pipeline, Kerr-McGee Pipeline Corporation, and has an interest in the White

Shoal Pipe Line Corporation, both of which are common carriers subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $649,372, $1,454,874, and $1,147,000, respectively, for the transportation of 1,427,622, 3,515,328, 3,171,000 barrels, also respectively.

Midland Cooperatives, Incorporated, of Minneapolis, Minn., operates a refinery at Cushing having a capacity of 17,000 barrels a day. It owns about 5 percent of NCRA. It operates terminals at Madison and Chippewa Falls, Wis., at which it receives and distributes petroleum products which have moved by WPBL. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $175,045, $373,843, and $662,166, respectively, for the transportation of 385,480, 919,055, and 1,447,282 barrels of petroleum products.

RATE ISSUES

History.—When WBPL acquired GLPL it adopted the rates of the latter. GLPL was subject to the maximum-rate order in the *Petroleum Rail Shippers* case. This order became effective on June 11, 1941, and was vacated on December 1, 1969. From group 3 origins (a ratemaking territory roughly 300 miles around Tulsa) the prescribed maximum rates were 28, 36, 42, 44, 58, and 67 cents a barrel to Kansas City, Kans., Des Moines, Iowa, Omaha, Nebr., Iowa City, Iowa, Minneapolis, Minn., and Chicago, Ill., respectively. The order further directed that additional origin or destination rates in the future bear a proper relationship to these maximum rates.

At the time of the rate prescription, delivery from the pipeline terminals was exclusively by rail tank car. With

the advent of World War II, truck loading racks were relationships as evidenced by the shipper reaction to WBPL's 1967 reductions that disturbed the group 3 origin grouping.

WBPL's rates are subject to unnamed points intermediate provisions at origins and destinations. Departures occur in connection with the investigated rates at the intermediate destination points of Columbia, Mo., Eldena (Amboy), Ill., and Iowa City, Iowa, at which relief is sought to maintain higher rates in fourth-section application No. 42327. The fourth-section application involves rates (1) from certain points in Kansas and Oklahoma to Columbia, Iowa City, and Eldena that are higher than rates from the same origins to Rockford, Ill.; (2) from certain points in New Mexico, Texas, Oklahoma, and Kansas to Columbia that are higher than rates from the same origins to St. Charles; and (3) from Borger, Tex., to Columbia and Iowa City that are higher than rates from Borger to St. Charles and Chicago. Fourth-section relief was granted in fourth-section application No. 41861 and fourth-section application No. 42096 in connection with prior rates. The relief sought here is required because of the rate change in docket No. 35533 and subs. The rates to the intermediate points of Columbia, Iowa City, and Eldena were subjected to the general increase of 3 cents a barrel, but the rates to the more distant points of St. Charles, Rockford, Peru, and Chicago were not increased because of pipeline and water carrier competition. The relief sought was not protested and no evidence was presented against the granting of the relief.

The initial rates.—The initial joint rates from three points served by Explorer to 45 Midwestern destinations served by WBPL under investigation in docket No. 35540 are uniformly 9.5 cents a barrel less than the combination of Explorer's rates and WBPL's rates.

The assailed rates.—The assailed rates are (1) the rates from points in Oklahoma, Kansas, Nebraska, and Minnesota maintained and applied by WBPL since August 20, 1970, and (2) the initial joint rates maintained and applied by WBPL and Explorer since they became effective January 8, 1972.

APPENDIX B

	1972	1973
Valuation[1]	$229,389,100	$238,195,500
Operating expenses	32,754,442	34,651,281
Taxes[2] (Federal income taxes at statutory 48 percent)	6,961,854	7,667,142
Revenues	59,974,532	62,741,955
Income after taxes	20,258,236	20,423,532
Rate of return on valuation—(percent)	8.83	8.57
Return at 10-percent valuation	22,938,910	23,819,550
Revenue shortfall	2,680,674	3,396,018
Interest expense	12,716,228	12,116,884

[1] Valuation of carriers owned and used properties—I.C.C. Valuation Docket No. 1423 (1972 and 1973).

[2] 0.48 times (Revenues—Operating Expenses—Interest on Long Term Debt)—I.C.C. Annual Report. Form P (1972 and 1973).

C-1

INTERSTATE COMMERCE COMMISSION

No. 35533[1]

PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY

Decided

December 3, 1976

On reconsideration, ultimate conclusions of Division 2 in prior report herein, 351 I.C.C. 102, affirmed.

1. In dockets No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2), increased pipeline rates on petroleum products from and to points in the Southwest and Midwest found just and reasonable and otherwise lawful. Proceedings discontinued.

2. In fourth-section application No. 42327, authority granted to establish and maintain the increased pipeline rates on petroleum products from certain points in New Mexico, Texas, Oklahoma, and Kansas to certain points in Illinois, Iowa, and Missouri without observing the long-and-short-haul provisions of the Interstate Commerce Act.

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[1] Also embraces dockets No. 35533 (Sub-No. 1), Petroleum Products to Ill., Iowa, and Mo., Williams Brothers Pipe Line Company, No. 35533 (Sub-No. 2), Petroleum Products, Williams Brothers Pipe Line Company, No. 35540, Petroleum Products, Louisiana & Texas to Midwest, fourth-section application No. 42327, Pipeline Rates-Petroleum Products from the Southwest, and docket No. 35720, American Petrofina Company of Texas, et al. v. Williams Brothers Pipe Line Company, et al.

3. In docket No. 35540, initial pipeline joint rates on petroleum products from Lake Charles, La., and Port Arthur, and Pasadena, Tex., to points in the Midwest found not shown to be unjust and unreasonable or otherwise unlawful. Proceeding discontinued.

4. In docket No. 35720, assailed pipeline rates on petroleum products from and to points in the Southwest and Midwest found not shown to be unjust and unreasonable or otherwise unlawful. Complaint dismissed.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

This matter was reopened for reconsideration by the entire Commission on its own motion on December 4, 1975. Concurrently, a petition filed by protestants/complainants for a declaration of general transportation importance was denied. Statements of argument and reply statements have been filed by the parties.

By schedules filed to become effective December 26, 1971, in docket No. 35533, January 27, 1972, in docket No. 35533 (Sub-No. 1), and March 25, 1972[2] in docket No. 35533 (Sub-No. 2), respondent, Williams Brothers Pipe Line Company[3] (WBPL) proposed to establish increased pipeline local rates and in connection with certain pipeline carriers increased pipeline joint rates on petroleum products, from and to certain points in the Southwest and

[2] Postponed from March 1, 1972.

[3] The name of Williams Brothers Pipe Line Company has been changed to Williams Pipe Line Company. However, the former name is used in this report, as is consistent with the record and with the usage employed in the previous decisions.

Midwest. Upon joint protest filed by certain shippers[4] (Shipper Group) the investigations in docket Nos. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2) were instituted on December 23, 1971, January 24, 1972, and March 7, 1972, respectively, concerning the lawfulness of the schedules which became effective on December 26, 1971, January 27, 1972, and March 25, 1972, respectively.

By fourth-section application No. 42327, WBPL seeks authority to establish and maintain the rates under investigation in docket No. 35533 (Sub-No. 1) without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act.

In docket No. 35540, by schedules filed to become effective January 8, 1972, respondent Explorer Pipeline Company (Explorer) and WBPL proposed to establish initial pipeline joint rates on petroleum products, from Lake Charles, La., and Port Arthur, and Pasadena, Tex., on the lines of Explorer to certain points in the Midwest on the lines of WBPL. Upon joint protest of the Shipper Group this proceeding was instituted on January 7, 1972, into and concerning the lawfulness of the schedules which became effective on January 8, 1972.

In docket No. 35720, by joint complaint filed August 23, 1972, the complainants, Shipper Group, allege that the pipeline rates charged on petroleum products to points in the Midwest by defendant WBPL from points in Oklahoma, Kansas, Nebraska, and Minnesota, and by defendants Explorer and WBPL from Lake Charles, Port Arthur, and Pasadena, were and are unjust and unreasonable,

[4] American Petrofina Company of Texas, Bell Oil & Gas Company, Farmers Union Central Exchange, Inc., Farmland Industries, Inc., CRA, Inc., Kerr-McGee Corporation, Midland Cooperatives, Inc., National Cooperative Refinery Association, and OKC Corporation. A statement of argument and a reply statement, following the Commission order reopening this proceeding, were filed jointly by these parties, except American Petrofina, Bell Oil & Gas, and OKC Corporation.

unjustly discriminatory, and unduly and unreasonably preferential and prejudicial in violation of sections 1(5) 2, and 3(1) of the Interstate Commerce Act. Complainants seek an order requiring defendants to cease and desist from the alleged violations of the act, to establish and maintain just and reasonable rates and charges, and to pay reparations in excess of $10,000 (approximately $5 million a year since August 20, 1970), plus interest, and costs and reasonable attorneys' fees.

A description of the parties and the rate issues, taken from the report of the Administrative Law Judge, is set forth in the Appendix hereto. In an initial decision served June 6, 1974, the Administrative Law Judge found that the proposed increased rates were lawful, that the fourth-section application should be granted, that the proposed initial joint rates were not shown to be unlawful, and that the rates assailed in the complaint were not shown unlawful.

Upon exceptions of the Shipper Group, the ultimate conclusions of the Administrative Law Judge were adopted by Division 2 (Commissioner Corber dissenting), in a decision reported at 351 I.C.C. 102, served November 5, 1975. The Division concluded that the reasonableness of WBPL's overall earnings should be measured by the standard of a 10-percent return on valuation as employed in *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.*, 243 I.C.C. 589 (1941). It found that WBPL's rates of return on valuation for 1972 and 1973 were 8.83 and 8.57 percent, respectively. Thus, the Division concluded that the challenged rates were reasonable. It also found that no preference and prejudice had been shown as between the proposed joint rates of Explorer and WBPL and the local rates of WBPL.

As noted, we denied the Shipper Group's petition for a declaration that these proceedings involve matters of

general transportation importance. While a number of fundamental policy questions have been raised by the Shipper Group, we are of the opinion that, for reasons stated below, such matters are beyond the proper scope of this proceeding.

Nevertheless, because of the relative dearth of precedent concerning petroleum pipeline rates, and in view of the substantial sums of money at issue here, we concluded that these proceedings merit consideration by the entire Commission. Accordingly, we reopened these proceedings for reconsideration on the present record. In order to obtain the views of the parties with respect to issues that they believed to arise from the decision of Division 2, we allowed the filing of statements of argument and replies thereto. Such statements have been filed by protestants/complainants—the Shipper Group—and by respondents/defendants WBPL and Explorer.

The Shipper Group argues that the Division's decision is wrong in several basic respects. Its objections go to the use of a valuation rate base, to the use of a 10-percent return standard, to the manner of calculation of revenues, expenses, and taxes, and to the finding that preference and prejudice were not shown. It also contends that the Division should have made findings going back to 1970 in order to dispose of the complaint. Finally, it requests oral argument, stating that "[t]he issues in this proceeding go to the essence of regulation."

WBPL supports both the reasoning and the result of Division 2's report. However, it argues that it is entitled, not only to a 10-percent return on its valuation, but also to a fair return on the amount of capital that it has actually invested. Thus, it [WBPL] objects to a statement in the report that its actual net investment cannot be accepted as the rate base. It also notes that a page appears to have been omitted from the excerpts of the Administrative

Law Judge's report that were reprinted in the Division's decision.

Explorer indicates that its interest is limited to the Division's findings concerning the lawfulness of the joint rates. It fully supports those findings.

At the outset, we will deny the shippers' request for oral argument. The issues have been extensively briefed in the various pleadings filed in this proceeding, and there appears to be no necessity for the oral presentation of further argument.

As noted by WBPL, a portion of excerpts from the Administrative Law Judge's report appears to have been inadvertently omitted from the Division's decision. To correct that omission, and for convenient reference, those excerpts are reprinted in full in the Appendix to this report.

DISCUSSION AND CONCLUSIONS

Upon review of this matter, we conclude that the criteria employed by Division 2 are the proper ones to use for this proceeding, and that, tested by these criteria, the overall rate level of WBPL has not been shown unjust and unreasonable during the period at issue in the complaint. We further conclude that the proposed increased rates have been justified, and that the proposed initial joint rates have not been shown unlawful. The particular points at issue will be discussed individually.

It is alleged both in the complaint and in the investigation proceedings that the general level of WBPL's rates is so high as to be unjust and unreasonable.[5] In order

[5] The issues in both the investigation and the complaint proceedings concern the reasonableness of WBPL's overall rate level, and not of particular rates apart from the overall level.

to test these allegations, it is necessary to examine WBPL's earnings under those rates.

The standard employed by Division 2 for this purpose was a 10-percent return on valuation. Questions have been raised in this proceeding both as to whether the carrier's valuation is the proper rate base, and as to what rate of return should be permitted.

The rate base. The three choices of rate base discussed in this record are original cost, valuation, and actual investment. The original cost rate base would be the original cost of the carrier's properties at the time they were put into common carrier service, less the amount of depreciation expense that has been charged against those properties to date. The valuation rate base would be the value of the carrier's properties found by the Commission pursuant to the requirements of section 19a of the Interstate Commerce Act. The actual net investment rate base would be the value of the carrier's properties recorded in its books, reflecting, not the original cost of those properties, but rather the price paid for them by Williams Brothers in acquiring the pipeline from its previous owner, Great Lakes Pipe Line Company (GLPL).

The practical differences between these rate bases are not insignificant. As noted by Division 2, at the end of 1966 (the year of the purchase from GLPL), these properties had a net original cost of $101.1 million, a valuation of $167.6 million, and represented an actual net investment of $287.8 million. If a 10-percent return standard were applied to each of these bases, the allowed earnings would be about $10 million, $16.8 million, and $28.8 million, respectively. While the year 1966 is not now in issue, differences of comparable magnitude would appear for later years.

The Shipper Group argues that the use of an original cost rate base is proper in that it compensates investors

for their contributions of capital to public service. It states that, in the case of this pipeline, the capital so devoted was the predecessor's original cost of carrier property of $175,839,059, plus WBPL's cost of subsequent prudent additions to the property, less accrued depreciation, including $91,359,860 of depreciation expenses recouped by the prior owners. The Shipper Group opposes the use of WBPL's actual investment, reflecting its purchase price, as a rate base, because the purchase price itself is based on the property's earning ability. The Shipper Group argues that there is circularity in using as a rate base a figure that reflects the earning capacity of the assets, when that earning capacity itself depends on the level of rates to be charged. The Shipper Group also opposes the use of the Commission's valuation as a rate base, considering the valuation procedure objectionable in a number of aspects, and believing that the use of a valuation base is unnecessary under current judicial standards and is at variance with the original cost concept.

In reply, WBPL opposes the use of an original cost rate base, stating that such a standard would be inconsistent with criteria employed in past pipeline rate cases, and was not contemplated by WBPL when it purchased the pipeline properties. WBPL favors the use of its actual net investment as the rate base, contending that its investors are entitled to a fair return on the capital that they have invested in the pipeline. WBPL acknowledges, however, that it made the purchase with notice of the likelihood that the Commission would use its valuation as the rate base for ratemaking purposes, and accepts the use of a valuation rate base.

We conclude that the Commission's valuation of WBPL's properties is the proper rate base to be employed in this proceeding. The Commission previously considered the reasonableness of pipeline rates in *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940), *Petro-*

leum Rail Shippers' Assn. v. Alton & S.R., 243 I.C.C. 589 (1941), and *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944). In each of those proceedings, the Commission's valuation of the carriers' properties was used as the rate base in judging the reasonableness of the carriers' rates. Considerations of consistency and fairness require that we adhere to our previously recognized criteria in investigating the rates of particular pipelines at the present time. Use of either original cost or actual net investment as the rate base would be such a fundamental change from previous policy that it may not properly be adopted for the first time in a proceeding involving the existing rates of a particular pipeline. Accordingly, the use of a rate base other than the Commission's valuations will not be further considered herein.

The Shipper Group contends that the valuation procedure used by the Commission produces an excessive rate base and results in unreasonable rates, arguing that (a) it uses an excessively inflated and unsupported "cost of reproduction new"; (b) it gives excessive weight to the cost of reproduction new as compared with the original cost; (c) it utilizes an arbitrary depreciation concept of "condition percent," without giving full recognition to actual accrued depreciation; and (d) it includes an arbitrary and unsupported 6 percent for going concern value. In reply, WBPL states that it followed conventional and well-established practice in relying on the Commission's valuation procedure, and that any proposed changes are not appropriate for consideration in this proceeding.

The technique employed by the Commission in making its valuations was discussed in the Division's report. As the Division found, this is not the proceeding for considering a change in the valuation methods. Such questions will be dealt with in the pending rulemaking proceeding in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.*

The Shipper Group also objects to the use in this proceeding of the Commission's valuations of WBPL for the years in question, on grounds that those valuations are tentative and not final. In making our findings herein, we have employed the final valuation of WBPL for 1970 and the tentative valuations for 1971, 1972 and 1973. As an alternative to the tentative valuations, we could have used WBPL's estimates of the valuations for those years, which do not differ materially from the tentative valuations.

We note that the valuations for 1971, 1972, and 1973 have not been made final because they were protested by the same parties that oppose WBPL's rates in this proceeding. No disposition of those protests have been made because the parties in the valuation proceedings requested that those proceedings be held in abeyance pending the outcome of the instant cases. Certainly, it cannot now be urged that the Commission is barred from using the tentative valuations, or reasonable estimates of valuations, for those years in this proceeding. Such a holding would leave the Commission without an acceptable basis for rendering a decision in these proceedings. The shippers have had the opportunity in these proceedings to state whatever objections they may have to the valuations used. They have not shown that there are errors in the property inventory used in the valuations, nor that the valuations, tentative valuations, and WBPL's estimated valuations for the years in question are inconsistent with the established valuation procedures. Rather, their objections go to the nature of the valuation procedures themselves, a matter not appropriate for consideration in this proceeding.

A question has also been raised by the shippers as to the inclusion of certain valuation figures in the rate base. In making a valuation for the carrier, the Commission establishes a value for property that is "owned and used" by the carrier, as well as for property that is "used but not

owned." The Shipper Group objects to the inclusion of "used but not owned" property in the rate base; it contends that to allow a return on such property while also allowing as an expense the rental payments on the same property results in a double charge to the ratepayer. WBPL replies that inclusion of this property is consistent with the Commission's valuation methodology and that, in any event, exclusion of this property would not affect the showing that WBPL's rates are reasonable.

We have included the value of "used but not owned" property in the valuations employed herein to judge the reasonableness of WBPL's earnings. However, we note that the valuations of such property amounted to only $1.6 million for 1970 and to about $4.5 million for 1971, 1972, and 1973. Exclusion of these amounts from the valuations would not substantially change WBPL's rates of return on valuation for the years in question. Whether such property should be included in the rate base is a matter that may be considered in Ex Parte No. 308.

Rate of return. Both WBPL and the Shipper Group used cost-of-capital studies to find what they considered proper rates of return. They determined the cost of debt capital by finding the overall interest rate that WBPL was paying for its outstanding debt. They computed the cost of equity capital in terms of the earnings available to investors in other firms or industries. Then they found a composite cost of capital by weighing these two figures according to WBPL's actual debt/equity structure. Not surprisingly, their procedures yielded similar results: the shippers found a cost of capital for WBPL of 8.25 percent, while the figure found by WBPL was 8.41 percent.

Where the parties diverge, however, is in their application of these figures. The shippers contend that the carrier is entitled only to a fair return on the original cost of its property. Thus, they would apply the determined cost of capital to an original-cost rate base. They state

that if valuation, rather than original cost, is to be used as the rate base, then the cost of capital figure should be adjusted downward to find a fair return. They reason that the valuation base provides investors with a measure of protection against inflation, and that investors having such protection will accept a lower percentage return.

WBPL, on the other hand, would apply the cost-of-capital figure to an actual investment rate base. It states that, in order to service its debt and to attract equity capital, it must have a sufficient return on its actual capitalization. For this reason, it would adjust its cost of capital figure upward if this figure is to be applied to a valuation rate base that is lower than WBPL's actual capitalization.

Rates of return of 8 percent on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines were determined to be reasonable in the *Reduced Pipe Line Rates*, *Minnelusa*, and *Petroleum Rail Shippers* cases, *supra*. In keeping with these decisions, Division 2 found that the earnings of WBPL, a carrier of petroleum products, would be reasonable if within a 10-percent return on valuation. The Division also recommended that the scope of the proceeding in Ex Parte No. 308 be broadened to include consideration of the rate of return question.

The Shipper Group argues that it was improper for the Division to go "outside the record" to rely on the *Petroleum Rail Shippers* decision as the basis for adopting a 10-percent return on valuation standard. It contends that the use of such a rate of return in the present proceeding is arbitrary, and that the rate is excessively high, affording the carrier double protection against inflation when applied to a valuation rate base.

WBPL considers the 10-percent standard employed by Division 2 to be conservative. It notes that capital costs

have been considerably higher in recent years than they were at the time of the *Petroleum Rail Shippers* case. It also argues that, as an independently owned pipeline, its financial risks and capital costs are higher than those of the shipper-owned pipelines in the cited case.

We agree with Division 2 that WBPL's earnings may be found reasonable if they are within a 10-percent return on valuation. In accordance with the Division's recommendation, we issued an order on January 4, 1976, expanding the scope of the proceeding in Ex Parte No. 308 to include an examination of the proper rate of return for petroleum pipelines. In the interim, until the principles underlying the determination of a fair rate of return for pipelines can be formulated in a proper proceeding, it would be unwarranted for us to hold that a rate of return which was considered reasonable in 1941 is excessive today.

In order to determine whether WBPL's earnings have been within the allowable limits, it is necessary to identify the dollar amount of those earnings. Thus, we begin with its operating revenues, and subtract its expenses and income taxes. Issues can arise as to what should be included in each of these categories. The manner in which such issues are resolved will affect the dollar amount of the income that the carrier is found to have earned. The record presents issues as to several of the revenue and expense categories.

Incidental revenues. WBPL's operating revenues are shown in its annual reports to the Commission for each of the years in question. For example, for 1972, WBPL reported operating revenues of $60,523,560. In Appendix B to the report of Division 2, however, revenues for 1972 are shown as $59,974,532. The difference is accounted for by the omission of the amount shown as "incidental revenues" in WBPL's annual report. The Shipper Group

argues that the incidental revenues should not have been excluded, and we agree. As indicated in the Uniform System of Accounts for Pipeline Companies, 49 CFR 1204, account 260, the category of "Incidental revenue" is clearly a component of operating revenues, and no reason for its exclusion appears. Accordingly, we have included incidental revenue in the operating revenues used in our computations.

Depreciation. The major issue presented with respect to expenses is the amount of depreciation to be allowed. The value that WBPL records in its books for its properties is based on the purchase price that it paid to Great Lakes. Its annual depreciation charges are based on the property values so recorded.

The shippers argue that this depreciation charge is too high. They contend that WBPL's property should be recorded in its books at the original cost of the previous owner, that WBPL's depreciation expense should be based on the original cost so recorded, and that the $91,359,860 in depreciation charges made by the previous owner should be reflected in WBPL's books.

Division 2 accepted WBPL's reported depreciation charges in computing its earnings for ratemaking purposes. We agree with this holding. The Commission stated in *Uniform System of Accounts for Pipeline Companies*, 337 I.C.C. 581, 522 (1970), that:

> When property is resold at a higher price than that for which it was originally purchased, the new owner is ordinarily entitled to record the price paid in its property accounts and to treat the current cost of ownership as an operating expense over the remaining life of the property.

The amount of depreciation expense reported by WBPL is in keeping with this holding.

In the cited case, the Commission observed that:

> [W]e are concerned here with accounting rules which are not necessarily dispositive of the manner in which expenditures will be treated in a proceeding to determine the reasonable level of particular rates.

Thus, the question arises as to whether the depreciation expense recognized for present purposes should be different from that allowed in WBPL's annual reports.

The only alternative that has been suggested is the use of a depreciation schedule based on the property's original cost, and reflecting all past depreciation charges on the property. However, this approach would eventually result in much of WBPL's property being completely depreciated for ratemaking purposes, while substantial depreciation expense on this property continues to be reported in its annual reports. We can see no reasonable basis for following an actual investment concept in our reporting requirements, while using an original cost concept in determining expenses for ratemaking purposes. Nor does the record suggest any other feasible alternative, for ratemaking purposes, to the use of a depreciation schedule based on the property value recorded in the carriers' books. Thus, WBPL's reported depreciation charges are accepted herein as its depreciation expense for ratemaking purposes.

There are several other respects in which the shippers consider WBPL's expenses to be overstated. These concern rate case expenses, lease payments to a subsidiary for a terminal, and payments to the parent Williams Brothers Company for administrative services. The shippers' contentions on these points were discussed in the report of Division 2 (see pages 122-125) and we agree with the Division that no amortization, modification or disallowance of these expenses is shown to be warranted.

Income taxes. An issue of substantial importance in this proceeding is the amount of the allowance for income taxes that should be made in determining WBPL's earnings. Because of tax benefits arising from the purchase, WBPL paid no income taxes in the years 1966 through 1970, and had low but increasing taxes through 1973. WBPL's actual taxes were below a statutory rate of 48 percent on income reported to the Commission, primarily because of the deferral of taxes arising from the use of accelerated depreciation, and because of the investment tax credit.

If only the amount of actual taxes paid is considered, WBPL's earnings would be in excess of a 10 percent return on valuation for the years here under consideration. On the other hand, if the calculation of WBPL's earnings is based on a "normalized" tax figure, using the 48-percent statutory tax rate, then its return is consistent with the 10-percent standard.

The factors favoring tax normalization are that deferred taxes must eventually be paid, at least to some extent, and that investment will be encouraged if the tax benefits arising from accelerated depreciation and from the investment tax credit are retained by the carrier rather than "flowed through" to the carrier's customers. In *Memphis Light, Gas & Water Div.* v. *Federal Power Com'n.* 500 F. 2d 798 (1974), a U.S. Court of Appeals upheld the Federal Power Commission's decision to permit a gas transmission company to use normalized accounting for ratemaking purposes. Public Law 92-178, which restored the investment tax credit in 1971, precludes a regulatory agency from immediately reducing the cost of service of a utility (not including carriers) by the full amount of the investment tax credit. The stated intent of that law is to provide an incentive for the modernization and growth of private industry.

The Shipper Group indicates opposition to the use of the statutory tax rate in its statement of argument on reconsideration. However, in its reply to WBPL's statement of argument, the Shipper Group states that it would not oppose the normalization of taxes by inclusion of the tax benefits resulting from the purchase, as long as the purchase price is reflected neither in the rate base nor in the depreciation expense. WBPL argues that normalization of taxes is necessary to avoid the uneven effects of accelerated depreciation on its tax liability over the life of its property, and will result in a more stable basis for determining the reasonableness of its rates.

In 1963, the Commission, following the traditional method of accounting at that time, required that only actual taxes be recorded in the carriers' books of accounts and financial statements. *Accounting for Federal Income Taxes,* 318 I.C.C. 803. However, the use of deferred tax accounting was subsequently approved as a generally accepted accounting principle by the accounting profession in Accounting Principles Board Opinion No. 11, "Accounting for Federal Income Taxes." The Commission thereupon modified its accounting rules for all carriers, including pipelines, in Docket No. 34178 (Sub-No. 2) to require the carriers to account for income taxes using the deferred tax method. The question remains as to whether similar treatment should be employed in computing earnings for ratemaking purposes. As noted by Division 2, consideration of this question will be appropriate in the broadened proceeding in Ex Parte No. 308.

Because the proper treatment of income taxes for ratemaking purposes is an open question at the present time, we feel that a rigid adherence to the flow-through approach in this proceeding would not be justified on the record before us. The consequences of such an approach could be the disapproval of WBPL's rates for several of the

years here under consideration, and the requirement that WBPL make large reparation payments to shippers. This result does not appear warranted at a time when deferred tax accounting has increasingly gained acceptance. Accordingly, upon careful consideration of the matter, we agree with Division 2 that the use of the statutory tax rate is preferable in this proceeding.

Reasonableness of earnings. The foregoing discussion provides the basis for computing WBPL's earnings for the years in question, and for measuring those earnings against a standard of reasonableness, namely, a 10-percent return on valuation.

Set forth below is the computation of WBPL's earnings and rate of return on valuation for the years 1970, 1971, 1972, and 1973. This table goes back to 1970 because the complaint brings the reasonableness of WBPL's rates into question as far back as August 20, 1970. It extends through 1973 because the record and the pleadings have concerned themselves with 1973 as well as the earlier years. Since the increased rates here under investigation became effective at about the beginning of 1972, the table encompasses a sufficient time period to show the reasonableness of WBPL's earnings under the increased rates as well as under the previous level.

	1970	1971	1972	1973
Operating revenues(a)	56,963,249	56,952,829	60,523,560	63,309,474
Operating expenses	29,892,092	30,192,321	32,754,442	34,651,281
Interest expense	13,420,000	13,315,456	12,716,228	12,116,884
Income tax(b)	6,552,555	6,453,625	7,225,387	7,939,828
Income after taxes(c)	20,518,602	20,306,883	20,543,731	20,718,365
Valuation(d)	211,143,500	226,706,100	229,389,100	238,195,500
Return on valuation	9.72%	8.96%	8.96%	8.70%

(a) Includes incidental revenues.
(b) Operating revenues, less operating expenses and less interest expense, times statutory rate of 48 percent.

(c) Operating revenues less operating expenses and less income tax.
(d) Final valuation for 1970 and tentative valuations for 1971, 1972, and 1973, from Valuation Docket No. 1423.

As may be seen, WBPL's return on valuation was below the 10-percent level for each of the years in question. Accordingly, we conclude that WBPL's earnings were not excessive for any of these years, and that its overall rate level for these years was just and reasonable.

Before concluding our discussion of this issue, we take note of the fact that the Shipper Group adduced comparisons of WBPL's rates with those of other pipelines, as additional support of its allegation that WBPL's rates were unreasonably high. Such comparisons indicate that WBPL's rates were higher than those of most other pipelines for movements of comparable distances. However, there are important differences in operating conditions that limit the usefulness of such comparisons. WBPL is an independent carrier, while most of the other pipelines are owned by the shippers that use them; WBPL's facilities consist of multiple small-diameter lines of pipe, in contrast to the potentially more efficient larger diameter pipelines of many other carriers; and WBPL provides common carrier terminal services at a large number of destinations, unlike the other carriers. These rate comparisons were given no attention by the parties in their arguments on reconsideration. We find them to be of little importance in view of the showing that WBPL's earnings did not exceed a reasonable level during the period at issue.

Preference and prejudice. The remaining issues in this proceeding have to do with the initial joint rates filed by Explorer and WBPL, and the relationship of such rates to the corresponding combinations of local rates. The joint rates apply between Explorer origins at Lake Charles, La., Pasadena and Port Arthur, Texas, and destinations on the

WBPL system. These rates were 9.5 cents a barrel lower than the combinations of local rates between the same points via Tulsa, Okla.

The Shipper Group originates shipments at Tulsa and other points on the WBPL system for movement under local rates. It contends that the disparity between the proposed joint rates and the corresponding local rates is preferential to Gulf Coast shippers and prejudicial to shippers in the Midcontinent area. It argues that the disparity is not accounted for by differing transportation conditions, that the local rates should bear the same relationship to distance and to the cost of service as the joint rates, and that WBPL can remedy the disparity by lowering the local rates or, impliedly, by withdrawing from the joint rates. The Shipper Group also contends that the joint rates favor the shipper owners of Explorer, who are competitors of the complaining shippers, in that Explorer allegedly receives an advantageous division of the joint rates. This is alleged to be a violation of the prohibition against personal discrimination in section 2 of the Act.

WBPL and Explorer reply that no preference and prejudice is shown. They argue that there is no legal requirement that joint rates equal the combination of local rates or that all rates be on the same per-mile basis, citing *St. Louis Southwestern Ry.* v. *United States*, 245 U.S. 136, 139 (1917). They further contend that neither carrier has control over both rates so as to be able to end the disparity by either raising one rate or lowering the other, as contemplated in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650 (1933), and in *New York* v. *United States*, 331 U.S. 284, 342 (1947). Further, they note that the shippers concede the compensatoriness of the joint rates and do not seek to have them raised. For this reason, the carriers contend that the allegation of preference and prejudice must be considered as withdrawn, under the

doctrine of *City of Moorehead* v. *Great Northern Ry. Co.*, 172 I.C.C. 38 (1931).

In addition, the carriers argue that the Shipper Group has not shown competitive injury from the rate disparity. They note that the Gulf Coast shippers must still pay at least 13.5 cents a barrel more than the Midcontinent shippers to reach the same destinations, and that the Midcontinent shippers did not experience a reduction in the volume shipped under the local rates after the Gulf Coast joint rates took effect.

Finally, the carriers argue that the lower level of the joint rates is justified by their purpose of generating additional traffic and increasing the utilization of the facilities of both carriers.

With respect to the discrimination argument, the carriers contend that no credible evidence of the carriers' divisions of the joint revenues was introduced, and that their divisions are not properly in issue in this proceeding. They state that no discrimination is shown, in that particular shippers are not being charged different rates for like services. Division 2 found that the Shipper Group had failed to prove either preference and prejudice or discrimination. Consistent with the Division's viewpoint are the arguments of WBPL and Explorer, as summarized above. We agree with those arguments, and with the conclusions of Division 2. For the reasons stated, the necessary elements of preference and prejudice, and of discrimination, have not been shown.

In addition, we note that the shippers' position is premised on the theory that all rates should bear a uniform relationship to cost. This theory would require that all of a carrier's rates include a pro-rata share of the carrier's fixed costs. However, such a requirement would preclude a carrier from transporting traffic that, for one reason or another, would not move at so high a rate level.

Yet, it is in the interest of both the carrier and its shippers that such traffic be handled, if it will move at any rate level above the variable costs incurred to transport it. Any contribution that such traffic makes to the coverage of the carrier's fixed costs reduces the fixed-cost burden to be borne by the carrier's other traffic. Thus, a carrier's rates are not required to have a uniform relationship to cost, but may take into account other factors, such as competition and demand.

In this proceeding, the Shipper Group concedes that the joint rates are high enough to be compensatory. The record indicates little likelihood that they could be substantially increased. Even at their existing level, the volume of the through traffic moving during the period of initial operations was less than anticipated. It was the opinion of Explorer's president that they were at about the highest level that the traffic would bear.

In fact, the Shipper Group does not seek to have the joint rates raised, but rather to have the local rates lowered. To illustrate the magnitude of the reductions desired by the shippers, we have set forth below their comparison of the respective rates to total costs, including a pro-rata allocation of fixed costs:

	Ratio of WBPL Local Rates to Cost From Tulsa	Ratio of Joint Rates to Cost From:		
		Lake Charles	Port Arthur	Pasadena
Alexandria, Minn.	1.43	.94	1.03	1.05
Bethany, Mo.	1.56	.77	.90	.90
Bettendorf, Ia.	1.30	.80	.91	1.46
Chippewa Falls, Wisc.	1.33	.87	.98	.98
Columbia, Mo.	1.83	.88	1.03	1.03
Des Moines, Ia.	1.62	.86	.99	.99
Doniphan, Neb.	1.29	.76	.87	.87
Dubuque, Ia.	1.53	.91	1.03	1.03

	Ratio of WBPL Local Rates to Cost From Tulsa	Ratio of Joint Rates to Cost From:		
		Lake Charles	Port Arthur	Pasadena
Duluth, Minn.	1.31	.88	.98	.98
Eldena (Amboy), Ill.	1.08	.72	1.09	.80
Fargo, N. D.	1.42	.97	1.07	1.07
Ft. Dodge, Ia.	1.68	.93	1.07	1.07
Grand Forks, N.D.	1.42	.99	1.09	1.09
Grand Forks (Western), N.D.	1.29	.91	1.01	1.01
Iowa City, Ia.	1.57	.89	1.02	1.02
Lincoln, Neb.	1.14	.66	.75	.75
Mankato, Minn.	1.52	.92	1.05	1.05
Marshall, Minn.	1.53	.95	1.07	1.07
Mason City, Ia.	1.58	.91	1.04	1.04
Milford, Ia.	1.45	.88	.99	.99
Minneapolis:				
Transfer Point	1.48	.93	1.04	1.04
Roseville	1.48	.93	1.04	1.04
Minn. St. Paul Int'l.	1.70	1.02	1.16	1.16
Omaha, Neb.	1.57	.85	.98	.98
Palmyra, Mo.	1.72	.90	1.04	1.04
Rochester, Minn.	1.33	.86	.97	.97
Sioux City, Ia.	1.63	.92	1.05	1.05
Sioux Falls, S.D.	1.58	.94	1.06	1.06
Superior, Wisc.	1.29	.87	.97	.97
Waterloo, Ia.	1.64	.99	1.15	1.15
Watertown, S.D.	1.53	.97	1.09	1.09
Wausau, Wisc.	1.46	.98	1.08	1.09
Wrenshall, Minn.	1.31	.99	.99	.99

We do not accept the particular cost calculations underlying this table, because they assume an original cost rate base. Nevertheless, it can be seen from this table that substantial reductions in the local rates would be required to place them in the same relationship to cost as the joint rates. Clearly, if such reductions were required, the level of WBPL's total revenues would be jeopardized. We find no warrant for such reductions where WBPL's revenues under existing rates have not been shown to be excessive.

Finally, we agree with Division 2 that no issue of discrimination arises from the ownership of Explorer by its shippers. As the Division found, Explorer is a separate entity from its shippers, and its arrangements with WBPL are not within the purview of section 2. Whether shipper ownership of petroleum pipelines has undesirable anticompetitive effects is another question. That question is now under consideration by the Commission in a proceeding instituted February 19, 1976, in Ex Parte No. 308 (Sub-No. 1), *Investigation of Common Carrier Pipelines.*

FINDINGS

On reconsideration, we conclude that the ultimate findings of Division 2 are correct and should be affirmed.

Thus, we find that in dockets No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2) the rates are just and reasonable and otherwise lawful; in fourth-section application No. 42327 authority be granted to establish and maintain increased rates without observing the long-and-short-haul provisions of the Interstate Commerce Act; in dockets No. 35540 and No. 35720 the rates are not shown to be unjust and unreasonable and otherwise unlawful.

COMMISSIONER O'NEAL, dissenting:

In my view this record is not sufficient for this Commission to find that the rates of WBPL are just and reasonable. Moreover, while the Shipper Group (within the limitations of its access to information) may have failed to prove either preference and prejudice or discrimination, it has raised serious questions concerning these matters as well as the undesirable anticompetitive effects possible because of the nature of WBPL's joint rate with the shipper-owned Explorer pipeline. Accordingly,

those considerations make it impossible for me to be sanguine about the majority's resolution of the issues relating to competition.

Last year Division 2 reached the same ultimate conclusion as the majority has in these proceedings (351 I.C.C. 102). Former Commissioner Corber dissented[6] making a number of points which still appear to be valid.

Among other things, Commissioner Corber raised questions concerning the tying of reasonableness to some theoretical value of the pipeline as a function of the Commission's valuation process. He urged consideration of determining reasonableness on the basis of a fair rate of return on shareholder's equity or on the basis of a combination of such return and a return based on the cost of debt. No such alternatives have yet been adequately explored and it does not seem sufficiently dispositive of the issue in these proceedings to say, in effect, that pipeline rate of return will be reexamined in another pending proceeding or that the instant rates should be approved because we based our findings on the I.C.C. valuations approach in 1940, 1941 and 1944.

The lawfulness of certain challenged rates is in issue here. Much more than the majority's passive, almost mechanical, response is required for fair resolution of these important issues in the public interest. I do not subscribe to the view that a fundamental change from previous policy may not properly be adopted for the first time in a proceeding involving the existing rates of a particular pipeline. An earlier approach by the ICC must not be used to sanction unlawful rates if that analysis and the resulting policy is in error. Equity could warrant softening of the impact of the new findings, but it certainly does not bar correcting any major ratemaking principles believed to be in error. Prior policy pronounce-

[6] Commissioner Corber's dissent appears at 351 I.C.C. 127-132.

ments do not bar new analysis necessary in examining particular rates or new conclusions on the issue of their lawfulness based upon that analysis. Especially is that true in this case since it is the first oil pipeline rate case to come before the Commission in over 30 years. Should it be otherwise, 35 years from now in the year 2011 the Commission or a successor agency may be looking back to this decision as a policy pronouncement barring a new objective analysis of the lawfulness of the then existing rate of a particular pipeline.

This case was reopened over a year ago for the purpose, I thought, of examining the basis for Division 2's decision in this case which rested primarily on precedent. But as happens in too many important cases, the agency has done little more than review additional representations of the parties. The challenging shippers are clearly at a disadvantage in this case, suggesting strongly that we should not rely solely on the submissions of the parties in making our decision.

Take, for example, the appropriateness of a 10 percent rate of return, which has been challenged in addition to and independently of questions about what is a proper rate base. A 10 percent rate of return seemed reasonable to this Commission in 1941 when it looked back over the period between the World Wars, saw increasing quantities of petroleum and petroleum products enter the stream of commerce and saw pipelines increasingly important for its transportation. In *Petroleum Rail Shippers Assn.* v. *Alton & S.R.*, 243 I.C.C. 589 (March 11, 1941), a proceeding in which WBPL's predecessor, Great Lakes Pipe Line Company, was a defendant, the defendants argued that the future of the pipelines was precarious.

Among the reasons advanced by the pipelines as to why the rate of return on investments in those companies should exceed that on industries in general were:

- Pipelines were initially highly speculative ventures, and could not have been financed through bond issues except at very high interest rates and at heavy discounts.
- An element of speculation in investments in pipeline transportation had continued with oil industry changes.
- Diminution and exhaustion of sources of crude-oil supply causing shut-downs or dismantling of refineries, the competition of other forms of transportation, and the discovery and production of crude oil within the destination territory, had all contributed to the risk of investment.
- Volume transportation had made the operation of a pipeline successful, and a substantial loss in volume could wipe out all opportunity for profit.
- Trucking of refined petroleum products from refineries into some States had increased dramatically.
- Transportation by water also had greatly increased.
- Changes in the oil industry had resulted in a decrease in shipments from some terminals, and other decreases were anticipated.
- There had been a temporary disuse of some pipeline and pumping stations, representing substantial unproductive investments.

In short, a high rate of return was supported upon arguments of risk including those based on the need for continuing transportation, market changes, and competitive forces.

Are these arguments valid today? Were they even scrupulously tested then? It is noteworthy that one of the principle issues under review in the cited proceeding was whether certain minimum railroad rates were unlawfully

unreasonable, discriminatory, or preferential and prejudicial when measured against increased competition from pipelines, the lower cost mode. Such considerations of competition for railroads were not likely to focus attention on the lowering of pipeline rates on the basis of rate of return. But even assuming that objectively a 10 percent rate of return was appropriate as we entered the 40's, how can we, upon challenge, reasonably justify affirming that rate of return for the 70's, without reexamining the financial experience of the pipeline in the intervening years or the risk and investment situation today?

Apart from these failures to exercise our expertise with respect to these broad rate of return questions, there are also serious questions relating to what are appropriate inclusions should the Commission valuation approach taken by the majority be utilized. Some of them are: Why are we allowing the pipeline to apply the statutory tax rate of 48% against its revenue when the pipeline has paid much lower actual taxes in the 70's and no taxes the five years prior thereto; why is property which is used, but not owned, being included in the valuation; why were not payments to affiliates or parent companies closely examined; what is the actual effect of our treatment of new facilities added during the year but not in use for the full year; and why shouldn't we examine how the costs vary among different segments of the pipeline? That information would help answer questions concerning the reasonableness of rates for particular movements.

While the tax questions do require that some care be taken not to countermand public policy as declared in the tax law, the practice of allowing taxes not actually paid to be treated as though they were paid is difficult to justify without information as to whether so treating them is necessary to preserve any incentive. But, in any event, other questions involving the valuation items are not

circumscribed by governmental tax policy. For instance, use of end-of-year valuations for determining allowable earnings seems to allow a full year's return on property that was not used for a full year. And using the value of property that the pipeline does not own but leases from others in the valuation for ratemaking purposes does not seem adequately justified merely by the fact that it has been so used in the past. While it is true that some of the pipeline's revenues is produced from such property, this has nothing to do with whether it should be included in the rate base. The purpose of such inclusion is to allow the pipeline a return on its capital costs. Unless there is an extraordinarily long lease this does not appear to be a capital cost item. Here we do not consider the length of any leases. Moreover, the carrier's lease expense is deducted from its revenues in determining the amount of the pipeline's earnings. It would certainly appear that allowing this item as a capital cost amounts to counting it twice.

The majority has not matched the costs against the revenues for specific segments, relying instead on overall rate of return for the entire pipeline to determine reasonableness. Thus, there was no effort to measure reasonableness of the specific rates that affected the users in this case. Furthermore, this practice provides the pipeline with the opportunity for discriminating among its users without ICC intervention, because under the apparent theory of the majority as long as the overall rate is reasonable, rates for specific parts of the whole are ignored.

The initial joint rates of WBPL and Explorer and the attack made upon them by the Shipper Group raise broad questions involving petroleum pipelines and the relations of shippers and pipelines in the petroleum industry.

In 1972 the House of Representatives Subcommittee on Special Small Business Problems of the Select Com-

mittee on Small Business issued a report[7] relating to the regulation of oil pipelines. The Subcommittee examined some relationships between independent oil pipelines and pipelines owned by the major shippers that use them. At the conclusion of the report the Committee made a number of recommendations, including the following, for ICC action:

1. Initiate a comprehensive investigation of the structure and operation of joint venture petroleum pipelines in order to determine the extent to which such pipelines operate as true common carriers.

2. Investigate the possibility of discrimination in pipeline rates by segments with respect to the entire pipeline industry.

3. Investigate practices regarding the setting of joint through pipeline rates and the resulting legal relations thus created, according particular attention to possible discriminatory practices.

4. Investigate the failure of joint venture petroleum pipelines to provide common terminal facilities for the use of a shipper, either for input or delivery, in order to determine if such failure constitutes discriminatory conduct.

5. Investigate the possibility of violations of the merger provisions of section 7 of the Clayton Act by joint venture petroleum pipelines, utilizing information on file at the Department of Justice.

The facts in this case seem to raise some of the classic questions that concerned the Subcommittee. For example, it is alleged that the WBPL portion (i.e. division) of the

[7] House Report No. 92-1617, "Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines" (October 18, 1972).

joint rate with Explorer is considerably lower than the local rate charged by WBPL to the shippers who are parties in this case. WBPL is the only pipeline available to such shippers. The position taken in the majority decision is that since WBPL cannot have total control over the joint rate (because the rate must be arranged with another party) then there cannot be discrimination.

The majority's view that common control is a prerequisite for a finding of discrimination reflects the position of a majority of the Commission in I. & S. Docket No. 8576, *Corn and Soybeans Midwest to Gulf Ports, For Export*, 349 I.C.C. 1. However, four Commissioners, myself included, dissented to that report, and the Commission has not always held that position; see the opinion of the U.S. Supreme Court in *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136 (1917), unholding a Commission order against a carrier to remove discrimination by establishing a lower joint rate with its connections. See also the dissent of Justice Stone in *Texas and Pacific Ry. Co. v. U.S.*, 289 U.S. 672 at 655, in which Justices Brandeis and Cardozo and Chief Justice Hughes concurred.

In my view a substantial question of discriminatory treatment of these shippers in this case has been raised. There is sufficient question at least to indicate that this agency, if it is to perform responsibly in this area, should exercise its considerable discretion to seek out information on its own motion which will satisfactorily answer whether the shippers in this case are being injured by discriminatory practices of WBPL and/or Explorer. As the House Committee noted, *we* are not precluded by the statute from examining activities in the pipeline industry simply because the *parties* to a case are prevented from obtaining the data necessary to make their cases.

The manner in which the majority decision deals with the issues relating to the initial joint rates filed by

Explorer and WBPL and the disparity of such rates to local rates used by the Shipper Group leaves much to be desired. In the real world relations between so-called independent pipelines such as WBPL and shipper-owned pipelines such as Explorer, no meaningful test of the fairness to the respective users of their services can be devised simply by focusing on such questions as whether the existing divisions of revenue are proper considerations in rate cases; whether there is a legal requirement that joint rates equal the combination of local rates or be on the same per mile basis; whether one carrier has control over both rates; or whether the joint rates themselves are compensatory. In this complex situation, it seems just too much to require that complaining shippers alone be expected to bear the burden of producing all the information necessary to establish whether or not unlawful discrimination, preference or prejudice exists. The Commission has the authority, and, I think, the responsibility to play a role in the information development process.

While it is perfectly respectable theory that added traffic resulting from operations under the joint rate need only be incrementally profitable to WBPL to be worthwhile traffic, what good is this fact as a determinant when we truly do not know:

- whether WBPL was forced to take a marginally lower effective rate for its portion of the joint operation because of threatened construction of a competitive pipeline by the connecting shipper-owned pipeline,
- whether it was similarly affected by its connecting carrier's shipper owners' control of other sources of the transportable product,
- whether the transportation charges to shipper owners of the connecting pipeline together with their participation in that pipeline's operating profits gives them a competitively superior position in marketing areas common to them and to the complaining shippers, the latter being dependent upon the rates and services of a so-called independent pipeline alone, or
- whether the growth and service opportunities of the so-called independent are or have been effectively frustrated by the shipper owners of a connecting pipeline with which its other users must compete. Such a situation would suggest that a lessening of competition prevails notwithstanding, perhaps even because of, the "independent's" unequal bargaining position.

I agree with the majority's view that all rates of the pipeline, to be lawful, need not bear a uniform relationship to cost. But unanswered questions exist as to the factors which warrant differing cost/revenue relationships; namely, competition and demand. To what extent, if any, are competition and demand manipulated in the interests of the competitors of some pipeline users? We have not scratched the surface of this question. Whether shipper ownership of petroleum pipelines has undesirable anticompetitive effects is a question which the Commission has placed under consideration in Ex Parte No. 308 (Sub-No. 1), *Investigation of Common Carrier Pipelines.* Hopefully, it will be thoroughly examined there. It is also my hope that the investigation will be fully responsive to the inquiry recommended by the Subcommittee on Special Small Business Problems.[8]

[8] It is noted, however, that a majority of the Commission rejected proposals to specifically include the Subcommittee's list as subjects for the Ex Parte No. 308 (Sub-No. 1) proceeding even though such proposals were supported by the Commission's Bureau of Enforcement. It is also somewhat unfortunate that several other ideas for broadening the inquiry, similarly supported by the Bureau of Enforcement, were likewise rejected by a majority.

While the situation alleged by the complaining shippers here may not be such as would make it appropriate to bar all shipper participation in the ownership of common carrier petroleum pipelines, it certainly points to the futility of rate regulation of pipeline rates under existing rules of procedure while the multifaceted roles of pipeline owning shippers and the effects of their activities remains unexplored and unknown to the regulators.

A significant number of important questions having been raised and not having been disposed of on the basis of a proper analysis by the majority's decision, I must respectfully dissent therefrom.

It is not enough and in fact is irrelevant insofar as the parties in this case are concerned to suggest as the majority does that the major issues given visibility by this case will be resolved in the broad rulemaking study now under way in Ex Parte No. 308 (Sub-No. 1). Nor is it sufficient to reject any further responsibility in this case because the complainants were unable to produce enough information to convince the majority. Our responsibility under the statute is to take affirmative steps, on our own without benefit of petition if necessary, to ensure that common carrier pipelines are operated in such a manner that the users of those pipelines who are not owners can fairly compete with other users including those who are owners. I fear we have failed in that responsibility in this proceeding. I am hopeful that we will not similarly falter in the Ex Parte No. 308 and Sub-No. 1 investigations.

VICE CHAIRMAN CLAPP AND COMMISSIONER CHRISTIAN did not participate.

It is ordered, That the investigations in docket No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35540 be, and they are hereby, discontinued and that the complaint in docket No. 35720, be and it is hereby

dismissed; and that the following fourth-section order No. 20281 is hereby entered:

FOURTH SUPPLEMENTAL FOURTH SECTION ORDER NO. 20281

PIPELINE RATES-PETROLEUM PRODUCTS FROM THE SOUTHWEST

It is further ordered, That fourth-section application No. 42327 be, and it is hereby approved; that the applicants herein be, and they are hereby, authorized to establish and maintain the rates proposed in the application for the transportation of petroleum products over their direct pipeline routes, from and to points named in the application, namely, from certain points in New Mexico, Texas, Oklahoma, and Kansas, to certain points in Illinois, Iowa, and Missouri, and to maintain higher rates to intermediate points; Provided that rates from or to such higher rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

By the Commission.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX

THE PARTIES

WBPL.—WBPL is principally engaged in the transportation of petroleum products. It also handles relatively small volumes of crude oil and liquid fertilizer. The

nucleus of its system was constructed in the early 1930's by its predecessor, Great Lakes Pipe Line Company (GLPL), a corporation then owned by eight oil companies. The basic system consisted of 1,238 miles of pipeline extending from refineries at six points in Kansas and Oklahoma to Kansas City, Kans., Des Moines, and Iowa City, Iowa, Omaha, Nebr., Minneapolis, Minn., and Chicago, Ill. Over the years various segments of the original system were looped with one or more parallel lines which could be tied into existing pump station facilities. After World War II a northwest leg, extending from Kansas City to Omaha and on to Grand Forks, N. Dak., was added. In 1965, GLPL had 6,228 miles of pipeline directly connected to 17 refineries and to 14 other pipeline systems. It operated 20 common carrier terminals and connected with 18 shipper-owned terminals. It served 33 shippers and transported 114,884,000 barrels of petroleum products.

WBPL acquired the assets of GLPL on March 29, 1966. By the end of 1971, WBPL had made seven extensions to the system and two additional loop lines, one from Barnsdale, Okla., to Eldorado, Kans., to St. Joseph, Mo., to Des Moines and the other from Des Moines to Mason City, Iowa. At the end of 1971, WBPL had 7,498 miles of pipeline which connected with 14 other pipeline systems. It operated 30 common carrier terminals and connected with 29 shipper-owned terminals. It served 50 shippers and transported 156,846,000 barrels of petroleum products. Additional data concerning WBPL's organization and operations are set forth in Valuation Docket No. 1423, *William Bros. Pipe Line Co., supra.*

Explorer.—Explorer was incorporated on September 27, 1967. It was organized for the purpose of constructing and operating a common carrier pipeline of refined petroleum products from the Gulf to Chicago, Ill. Construction commenced in 1970 and was completed in 1972. The first section of the line became operational on October 26, 1971,

from Lake Charles, Port Arthur, and Pasadena to Houston, Grapevine, and Irving, Tex. On January 8, 1972, the line was opened to Tulsa permitting inauguration of joint-line service with WBPL. In late May 1972 the final section into Hammond, Ind., was opened and became operational in late June. Construction of four delivery points in St. Louis, Mo., and Peotone, Ill., continued into the second half of 1972. The system became fully operational in late 1972.

Shipper Group.—OKC Corporation did not introduce any evidence.

American Petrofina Company of Texas operated three refineries and markets refined petroleum products in 24 States. Its primary use of WBPL is from its refinery at El Dorado, Kans. This refinery has a daily capacity of 22,500 barrels of crude oil. The other refineries at Mount Pleasant and Big Springs, Tex., have daily capacities of 26,500 and 60,000 barrels, respectively. In the period from August 23 through December 31, 1970, it shipped 2,429,427 barrels by WBPL on which it paid charges of $923,210. In 1971 its shipments and charges therefore totaled 7,518,891 barrels and $2,737,077. The 1972 figures are said to approximate 1971 totals.

Bell Oil & Gas Company has merged with Vickers Petroleum Corporation which is owned by Swift and Company. Vickers operates a 30,000-barrels-a-day refinery at Ardmore, Okla. (formerly Bell Oil & Gas refinery), and has about 750 miles of pipeline for gathering crude oil. Refined products are shipped at three-line joint rates from Ardmore via the Bell Oil and Gas Company (a short products line owned by Vickers) to Ardmore Junction, Okla., thence via ARCO Pipe Line Company to Kansas City, and thence via WBPL to some 30 points on the lines of WBPL. The joint rates are named in ARCO Pipe Line Company Joint Tariff No. 166, I.C.C. No. 124. The joint rates in that tariff are not the matter of investigation or

complaint here. Bell Oil & Gas and/or Vickers paid WBPL total transportation charges of $414,827.16 and $1,280,491.87 for the transportation of 756,495 and 2,519,601 barrels of petroleum products, respectively, in the period August 23 through December 31, 1970, and January 1 through December 31, 1971, also respectively. Whether such payments and transportation were covered by the ARCO tariff or the rates at issue here is not of record.

National Cooperative Refinery Association (NCRA) operates a refinery at McPherson, Kans., with a capacity of 45,000 barrels a day. It provides its owner-cooperatives with an organization and operation to supply petroleum products. It distributes its products via WBPL and other pipelines to its owner-cooperatives which then distribute through local cooperatives and ultimately to their individual farm family members. Approximately 30 percent of NCRA is owned by Farmland Industries, approximately 30 percent by Farmers Union Central Exchange, Inc., and approximately 5 percent by Midland Cooperatives, Inc., all of whom are protestants-complainants here. NCRA owns an interest in Jayhawk Pipeline, a crude oil pipeline subject to this Commission's jurisdiction. NCRA paid WBPL total transportation charges of $2,707,348, $5,143,849, and $4,257,607 for the transportation of $5,264,655, 10,079,877, and 7,739,061 barrels, respectively, in the periods, August 23, through December 31, 1970, January 1 through December 31, 1971, and January 1 through September 30, 1972, also respectively.

CRA, Inc., is a wholly owned subsidiary of Farmland Industries, Inc., with refineries at Coffeyville and Phillipsburg, Kans. The Coffeyville refinery, with a capacity of 32,500 barrels a day, is connected to WBPL. The Phillipsburg refinery, with a daily capacity of 17,500 barrels, is connected to Kaneb Pipe Line. CRA also has a refinery at Scottsbluff, Nebr., with no pipeline connection. It also

operates a pipeline common carrier of crude oil. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971 and January 1 through September 30, 1972, CRA paid WBPL $1,689,384, $3,145,403, and $2,075,805, respectively, for the transportation of 4,482,402, 8,353,284, and 6,100,000 barrels.

Farmland Industries, Inc., of Kansas City, Mo., is a regional farmer cooperative owned by approximately 2,000 local farmer cooperatives. It has gross sales of over $750 million annually and net income of over $20 million. It owns about 30 percent of NCRA and wholly owns CRA.

Farmers Union Central Exchange, Inc., of St. Paul, Minn., is a regional farmer cooperative owned by local farmer cooperatives. It has gross annual sales of $250 million and owns about 30 percent of NCRA. It also owns an oil pipeline which until recently was operated as a common carrier subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $165,960, $434,920, and $418,419 respectively, for the transportation of 411,688, 1,141,840, and 1,155,188 barrels of refined petroleum products, also respectively.

Kerr-McGee Corporation, of Oklahoma City, Okla., is a diversified natural resources company. In the production and sale of petroleum products it operates a refinery at Wynnewood, Okla., with a capacity of 33,000 barrels a day. Until recently it also operated a 15,000-barrel-a-day refinery at Cushing, Okla. It owns a pipeline, Kerr-McGee Pipeline Corporation, and has an interest in the White Shoal Pipe Line Corporation, both of which are common carriers subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $649,372, $1,454,874, and

$1,147,000, respectively, for the transportation of 1,427,622, 3,515,328, 3,171,000 barrels, also respectively.

Midland Cooperatives, Incorporated, of Minneapolis, Minn., operates a refinery at Cushing having a capacity of 17,000 barrels a day. It owns about 5 percent of NCRA. It operates terminals at Madison and Chippewa Falls, Wis., at which it receives and distributes petroleum products which have moved by WBPL. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $175,045, $373,843 and $662,166, respectively, for the transportation of 385,480, 919,055, and 1,447,282 barrels of petroleum products.

RATE ISSUES

History.—When WBPL acquired GLPL it adopted the rates of the latter. GLPL was subject to the maximum-rate order in the *Petroleum Rail Shippers* case. This order became effective on June 11, 1941, and was vacated on December 1, 1969. From group 3 origins (a ratemaking territory roughly 300 miles around Tulsa) the prescribed maximum rates were 28, 36, 42, 44, 58, and 67 cents a barrel to Kansas City, Kans., Des Moines, Iowa, Omaha, Nebr., Iowa City, Iowa, Minneapolis, Minn., and Chicago, Ill., respectively. The order further directed that additional origin or destination rates in the future bear a proper relationship to these maximum rates.

At the time of the rate prescription, delivery from the pipeline terminals was exclusively by rail tank car. With the advent of World War II, truck loading racks were constructed and by 1942 most deliveries were by motor carrier. At present less than 1 percent of the deliveries out of WBPL's terminals is by railroad. Effective May 2,

1942, a separate terminaling charge of 5 cents a barrel was established for loading and billing truck deliveries. Subsequently, this terminaling charge fluctuated in amount and on June 25, 1969, WBPL adjusted its line-haul rates to include the terminaling charge. A comparison of GLPL 1942 rates plus the 5-cent loading and billing charge with the present WBPL rates from group 3 origins to primary destinations is shown in the following table:

From: Group 3 To:	Rates and rate differences in cents per barrel		
	1942	1972	Difference
Kansas City, Kans.	33	30	−3
Des Moines, Iowa	41	47	+6
Omaha, Nebr.	47	47	0
Iowa City, Iowa	49	55	+6
Minneapolis, Minn.	63	68	+5
Chicago, Ill.	63	51	−12

In 1947, CLPL had 14 destination terminals. At present WBPL's rates to these terminals are on the average 7.93 cents a barrel (0.189 cent a gallon) or 14.7 percent higher than the 1947 rates of Great Lakes. In the same period rail and motor carriers have increased their rates more than 30 percent.

WBPL's first changes in rates were made in the fall of 1967. One of these changes was to reduce its rates from distance-favored origins in group 3 to all destinations and from all group 3 origins to certain destinations. The reduction became effective over the protest of some of the Shipper Group and became the matter of complaint by those protestants. Early in 1969, WBPL restored the prior rate grouping and the complaint was withdrawn. Since then WBPL has had three basic general-rate increases with certain holddowns for competitive reasons. The last of these increases is the matter of investigation in No. 35533 and subs.

The changed rates.—In general the rates under investigation in No. 35533 and subs are 3 cents (in instances less than 3 cents) a barrel higher than the prior rates. These increases were by flat amounts to maintain historic rate relationships among the various origins. It is a common practice among shippers of petroleum products at such origins to exchange products with one another based upon the pipeline rate differential and are sensitive to changes in rate relationships as evidenced by the shipper reaction to WBPL's 1967 reductions that disturbed the group 3 origin grouping.

WBPL's rates are subject to unnamed points intermediate provisions at origins and destinations. Departures occur in connection with the investigated rates at the intermediate destination points of Columbia, Mo., Eldena (Amboy), Ill., and Iowa City, Iowa, at which relief is sought to maintain higher rates in FSA No. 42327. The fourth-section application involves rates (1) from certain points in Kansas and Oklahoma to Columbia, Iowa City, and Eldena that are higher than rates from the same origins to Rockford, Ill.; (2) from certain points in New Mexico, Texas, Oklahoma, and Kansas to Columbia that are higher than rates from the same origins to St. Charles; and (3) from Borger, Tex., to Columbia and Iowa City that are higher than rates from Borger to St. Charles and Chicago. Fourth-section relief was granted in FSA No. 41861 and FSA No. 42096 in connection with prior rates. The relief sought here is required because of the rate change in No. 35533 and subs. The rates to the intermediate points of Columbia, Iowa City, and Eldena were subjected to the general increase of 3 cents a barrel, but the rates to the more distant points of St. Charles, Rockford, Peru, and Chicago were not increased because of pipeline and water carrier competition. The relief sought was not protested and no evidence was presented against the granting of the relief.

The initial rates.—The initial joint rates from three points served by Explorer to 45 midwestern destinations served by WBPL under investigation in No. 35540 are uniformly 9.5 cents a barrel less than the combination of Explorer's rates and WBPL's rates.

The assailed rates.—The assailed rates are (1) the rates from points in Oklahoma, Kansas, Nebraska, and Minnesota maintained and applied by WBPL since August 20, 1970, and (2) the initial joint rates maintained and applied by WBPL and Explorer since they became effective January 8, 1972.

No. 35533, et al

Service Date
June 6-1974

Interstate Commerce Commission

Certificate of Service

The SECRETARY of the Interstate Commerce Commission hereby certifies that the attached initial decision of the Administrative Law Judge has been filed with and duly made part of the record herein and has this date been served upon all known parties in the manner provided by law and the regulations of this Commission.

Exceptions to said decision, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C. 20423, and served on all other parties of record within 30 calendar days (20 days if there are no other parties) from the date of service shown above. Replies thereto may be filed within 20 calendar days after the final date for filing exceptions. If either date falls upon a Saturday, Sunday, or legal holiday, then the applicable pleading must be filed by the end of the next business day.

If no exceptions are filed to the initial decision, and it is not stayed by the Commission, the initial decision becomes the order of the Commission in operation of law upon expiration of the period for filing of exceptions. The parties to this proceding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received.

In addition, any new operation to be authorized by the initial decision, if it becomes the order of the Commission by operation of law, may not be commenced until a certificate, permit, or license, as the case may be, has actually been issued by the Commission. A certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder as specifically set forth in the initial decision.

ROBERT L. OSWALD
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. 35533[1]

PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY

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1. In No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2), increased pipeline rates on petroleum products from and to points in the Southwest and Midwest found just and reasonable and otherwise lawful. Proceedings discontinued.

2. In fourth-section application No. 42327, authority granted to establish and maintain the increased pipeline rates on petroleum products from certain points in New Mexico, Texas, Oklahoma and Kansas to certain points in Illinois, Iowa, and Missouri without observing the long-and-short-haul provisions of the Interstate Commerce Act.

3. In No. 35540, initial pipeline joint rates on petroleum products from Lake Charles, La., and Port Arthur, and Pasadena, Tex., to points in the Midwest found not shown to be unjust and unreasonable and otherwise unlawful. Proceeding discontinued.

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[1] Also embraces No. 35533 (Sub-No. 1), Petroleum Products to Ill., Iowa, and Mo., Williams Brothers Pipe Line Company, No. 35533 (Sub-No. 2), Petroleum Products, Williams Brothers Pipe Line Company, No. 35540, Petroleum Products, La. & Texas to Midwest, fourth-section application No. 42327, Pipeline Rates—Petroleum Products from the Southwest. and No. 35720, American Petroleum Company of Texas, et al. v. Williams Brothers Pipe Line Company, et al.

4. In No. 35720, assailed pipeline rates on petroleum products from and to points in the Southwest and Midwest found not shown to be unjust and unreasonable and otherwise unlawful. Complaint dismissed.

Robert G. Bleakney, Jr., Robert L. Calhoun, John S. Estill, Jr., and *David M. Schwartz* for a respondent in No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35440, for applicant in F.S.A. No. 42327, and for a defendant in No. 35720.

Donald W. Markham and *Howard D. McCloud* for a respondent in No. 35440 and a defendant in No. 35720.

John McCleary, John F. Donelan, and *Frederic L. Wood* for protestants in No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), F.S.A. No. 42327, and No. 35440 and for complainants in No. 35720.

By George A. Dahan, Administrative Law Judge:

These proceedings are the first to consider the rates for a major petroleum products pipeline since *Petroleum Rail Shippers' Assn.* v. *Alton & S. R.*, 243 I.C.C. 589 (1941), and *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944). Evidence, argument and requested findings not specifically discussed in this report nor reflected in the findings or conclusions have been considered and found not essential to the decision. *Columbia Transportation Company* v. *United States*, 167 F. Supp. 5 (E.D. Mich. 1958).

By schedules filed to become effective December 26, 1971, in No. 35533, January 27, 1972, in No. 35533 (Sub-No. 1), and March 25, 1972,[2] in No. 35533 (Sub-No. 2), respondent, Williams Brothers Pipe Line Company (WBPL) proposed to establish increased pipeline local rates and in connection with certain pipeline carriers increased pipeline joint rates on petroleum products, from and to certain

[2] Postponed from March 1, 1972.

points in the Southwest and Midwest. Upon joint protest filed by certain shippers[3] (Shipper Group) the investigations in No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2) were instituted on December 23, 1971, January 24, 1972, and March 7, 1972, respectively, into and concerning the lawfulness of the schedules which became effective on December 26, 1971, January 27, 1972, and March 25, 1972, also respectively.

By fourth-section application No. 42327, WBPL seeks authority to establish and maintain the rates under investigation in No. 35533 (Sub-No. 1) without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act.

In No. 35540, by schedules filed to become effective January 8, 1972, respondents Explorer Pipeline Company (Explorer) and WBPL proposed to establish initial pipeline joint rates on petroleum products, from Lake Charles, La., and Port Arthur, and Pasadena, Tex., on the lines of Explorer to certain points in the Midwest on the lines of WBPL. Upon joint protest of the Shipper Group this proceeding was instituted on January 7, 1972, into and concerning the lawfulness of the schedules which became effective on January 8, 1972.

In No. 35720, by joint complaint filed August 23, 1972, the complainants, Shipper Group, allege that the pipeline rates charged on petroleum products to points in the Midwest by defendant WBPL from points in Oklahoma, Kansas, Nebraska, and Minnesota, and by defendants Explorer and WBPL from Lake Charles, Port Arthur and Pasadena, were and are unjust and unreasonable, unjustly discriminatory, and unduly and unreasonably preferential and prejudicial in violation of sections 1(5), 2, and 3(1) of

[3] American Petrofina Company of Texas, Bell Oil & Gas Company, Farmers Union Central Exchange, Inc., Farmland Industries, Inc., CRA, Inc., Kerr-McGee Corporation, Midland Cooperatives, Inc., National Cooperative Refinery Association, and OKC Corporation.

the Interstate Commerce Act. Complainants seek an order requiring defendants to cease and desist from the alleged violations of the act, to establish and maintain just and reasonable rates and charges, and to pay reparations in excess of $10,000 (approximately $5 million a year since August 20, 1970), plus interest, and costs and reasonable attorneys' fees.

Procedural Matters

By orders of January 21, January 28, and February 23, 1972, in No. 35533, No. 35533 (Sub-No. 1), and No. 35540, respectively, the Commission directed each of these proceedings to be handled under modified procedure. By order of February 4, 1972, the order of January 28, 1972, directing modified procedure in No. 35533 (Sub-No. 1) embracing also F.S.A. No. 42327 was vacated and set aside and the matters therein designated for oral hearing. Upon petition of the Shipper Group for consolidation for hearing and disposition of No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35540 to which WPBL and Explorer objected to the inclusion of No. 35540 in the consolidation, the petition was granted and the orders of January 21 and February 23, 1972, directing modified procedure were vacated and set aside by order of March 22, 1972. A petition for reconsideration of the order of March 22, 1972, filed by WBPL and Explorer was denied by order of June 26, 1972. By order of July 24, 1972, as modified by order of September 5, 1972, upon consideration of petitions for reconsideration filed by WBPL and Explorer, the consolidated proceedings were set for hearing on December 4, 1972, and directed that the direct evidence of respondent-applicant, WBPL, in No. 35533 and subs and F.S.A. No. 42327 and of protestants, Shipper Group, in No. 35540 be filed with the Commission and served upon the parties on or before November 1, 1972. On the date of the filing of their complaint the Shipper Group

requested that the complaint in No. 35720 be consolidated with the investigations and application in No. 35533 and subs, No. 35540, and F.S.A. 42327, to which WBPL and Explorer objected. By order of September 25, 1972, the complaint in No. 35720 was consolidated with the investigations and application in No. 35533 and subs, No. 35540, and F.S.A. No. 42327, and by order of October 3, 1972, the complainants, Shipper Group, were directed to file their direct evidence with the Commission and at the same time serve copies upon defendants, WBPL and Explorer, on or before November 1, 1972.

The hearing commenced on December 4, 1972, with the cross-examination of WBPL's witnesses on their written direct evidence served on November 1, 1972, in No. 35533 and subs and F.S.A. 42327. On December 11, 1972, during the course of this inquiry, the Administrative Law Judge severed the complaint in No. 35720 from the other proceedings. The hearing in the consolidated proceedings No. 35533 and subs, No. F.S.A. 42327, and No. 35540 closed on May 29, 1973. The hearing in No. 35720 commenced on December 14, 1972, and concluded on May 30, 1973. Briefs were filed in the consolidated proceedings and in No. 35720 on July 27, 1973.

On September 28, 1972, WBPL filed a pleading in response to the complaint in No. 35720. The pleading included motions to dismiss (1) Farmland Industries, Inc., as a party complainant, and (2) complainants' request for costs and attorneys' fees. By order of October 31, 1972, these motions were denied. The denial order included the statement "any arguments as to the merits can be made in connection with the formal record." WBPL argues its motions on brief. It modified its motion to dismiss Farmland Industries as a party complainant, and now seeks dismissal of this complainant to the extent that damages and interest are sought. Farmland Industries has tendered no shipments and made no payments to

WBPL. Its subsidiary CRA, Inc., another complainant which made shipments, is a separate and distinct entity. Farmland Industries may not be awarded damages. *Max Wedeles Tobacco Co.* v. *Director General*, 92 I.C.C. 80. The complaint seeks rates for the future as well as damages as to the past. Farmland Industries is a proper complainant as to rates for the future and its interest in the joint complaint should be so construed. This construction precludes the necessity for further consideration of WBPL's motion to dismiss Farmland Industries. The Commission is without jurisdiction to award costs and counsel fees. *Jones & Kavanagh Co., Ltd.*, v. Southern Pac. Co., 219 I.C.C. 105. Complainants' request for costs and attorneys' fees is dismissed.

WBPL and Explorer renew their motion to strike tables 110 through 114 and tables 116 through 120 and all testimony related thereto of Exhibit No. 64 in No. 35720 and of Exhibit No. 81 in No. 35440. These tables and the testimony related thereto represent the witness' opinion as to the divisions of the joint rates maintained and applied by WBPL and Explorer. During the early stages of the hearings evidence pertaining to divisions of the joint rates was excluded by the Administrative Law Judge pursuant to the general rule that the question of the division of a joint rate is a matter of no concern to a shipper. *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234 (1925); *Great Northern Railway Co.* v. *Sullivan*, 294 U.S. 458, 463 (1935); *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 319 I.C.C. 123, 126-127 (1963); *Sulphur, Louisiana and Texas to Mich., N.Y., Ohio, and Pa.*, 287 I.C.C. 129, 151 (1952).

During the last stages of the hearings the Administrative Law Judge was persuaded to receive the matter of the renewed motions to strike by counsel's argument that the philosophy of the Commission adopted recently in the "Catawba" and "Del Monte" cases showed greater concern

in situations where carriers were owned by shippers on the questions of discrimination and preference and prejudice. Neither "Catawba" (Docket No. 33374, *Divisions—Textiles, South Carolina to the East*, Decision and Order of March 20, 1963) nor "Del Monte" (*Encinal Terminals—Control—Shippers Express Co.*, 109 M.C.C. 407 and 109 M.C.C. 536) have any bearing on the relevance of divisions to the lawfulness of joint rates. "Catawba" concerned the lawfulness of divisions of joint rates between a shipper-controlled motor carrier and its 15 connecting motor carriers, a matter involving the alignment of the divisions between the parties. "Del Monte" involved a joint application for acquisition of control of a motor carrier by a shipper under statutory standards entirely different from those applying to oil pipelines. In his argument counsel for the Shipper Group stated:

> We are not asking the Commission to realign these divisions. We don't know whether this is the actual division or not. We are saying this is what the economics show as to where the money is going. And when this type of money is going to the pocket of Explorer Pipeline, which is owned by competing shippers, it is ultimately flowing right back to the benefit of exactly the competing shippers.
>
> This is a question to be clearly distinguished from whenever the Commission has looked at divisions before, because in this case we have divisions, a split of revenues, that is going right back to competing shippers.

Of course a realignment of the divisions is not asked because that involves a matter between carriers which is outside the scope of both proceedings, No. 35540 and No. 35720. The "divisions" which are the matter of the renewed motions to strike are mere mathematical calculations by the witness who admitted that "I was unable to

compute precisely the—fairly precisely, I might say—divisions for Williams Brothers, since we did not know the barrels shipped to and from different origins." The admissions of both the witness and his counsel run to the probative value of the "divisions" if admissible.

The thrust of the argument by counsel for the Shipper Group is that evidence of divisions between common carriers which is irrelevant on the question of the lawfulness of joint rates becomes relevant on the same question if one of the carriers party to the joint rates is shipper-owned because a section 3(1) preference and prejudice arises from the use of the joint rates by the shipper owners of the shipper-owned carrier and the use of the connecting carrier's local rates by competing shippers. If section 3(1) questions arise from divisions between shipper-owned carriers and other carriers, then shipper-owned carriers must be prohibited from establishing joint rates in connection with their statutory duty under section 1(4) to establish through routes with other carriers. Section 1(4) contains no statutory prohibition and shipper-owned common carriers of all modes, rail, oil pipeline, motor, and water, have long maintained through routes and joint rates. In the final analysis the question of divisions under sections 1(4) and 3(4) is a matter between carriers; the question of undue preference and prejudice under section 3(1) is a matter between shippers and carriers; the shipper-owned common carrier and its public-owned connecting carrier must accord the same treatment in the transportation of freight for both its owner shippers and nonowner shippers under their joint rates (section 2); the divisions of the joint rates do not "flow right back to the benefit" of the nonowner shippers which use the joint rates; the joint rates cannot be unduly and unreasonably preferential of some shippers (shipper owners of a carrier party to the joint rates) to the undue or unreasonable prejudice of shippers at the local rates of

the public-owned connecting carrier and at the same time be neither unduly or unreasonably preferential nor prejudicial when used by shippers which are not owners of one of the carriers; the issue of undue preference and prejudice concerns the joint rates and not the divisions which the participating carriers receive from the joint rates; whether one carrier (public- or shipper-owned) is short-changed in divisions with another carrier (public- or shipper-owned) is a matter concerning the alignment of divisions between the carriers under section 1(4) requiring the establishment of just, reasonable, and equitable divisions of joint rates which shall not unduly prefer or prejudice the participating carriers; and since this question is foreign to the issues whether the joint rates are just and reasonable, whether the joint rates are discriminatory, and whether the joint rates are unduly or unreasonably preferential and prejudicial, all evidence concerning the divisions between Explorer and WBPL are irrelevant. The renewed motions to strike should be granted. Tables 110 through 114 and tables 116 through 120 and all testimony related thereto of Exhibit No. 64 in No. 35720 and of Exhibit No. 81 in No. 35440 are stricken.

Explorer also renews its objections to the testimony of Mr. D. W. Calvert, executive vice president of WBPL, before the House Subcommittee on Special Small Business Problems, contained in Exhibit No. 26 and table 83 of Exhibit No. 63 in No. 35720 and in table 83 of Exhibit No. 72 in No. 35533 et al., particularly portions relating to divisions. The portions relating to divisions are stricken. To correct a misunderstanding in Mr. Calvert's testimony it should be observed that neither the complaint in No. 35720 nor the investigation of the joint rates in No. 35440 involves the lawfulness of the divisions of the joint rates, and as quoted above counsel for the Shipper Group stated that the Commission is not asked here to realign the divisions. Whenever good cause appears the Commission

does not hesitate to institute an investigation upon its own motion, or upon complaint, into and concerning the lawfulness of divisions of joint rates. The Catawba case was such an investigation on this Commission's own motion.

The briefs of the Shipper Group contain the following: "Objections to rulings at the hearings . . . are repeated and preserved." This does not comply with rule 87 of the Commission's General Rules of Practice. The objections to the unspecified rulings must be considered as waived. The Shipper Group also objects to the following rulings (1) through (4) in No. 35533 et al. and (1) through (6) in No. 35720:

(1) The separation of the proceedings; the Hearing Officer separated the complaint proceedings Docket 35720 from the investigation cases and further refused, contrary to Rule 82 of the General Rules of Practice to permit the records generally to be incorporated in the other case.

(2) Refusal to permit questions of the former Director of the Bureau of Accounts on relevant matters.

(3) Refusal to permit any questions of the respondents-defendants on the questions of divisions given by WBPL to the shipper owned Explorer Pipe Lines.

(4) Admission into evidence of exhibits and testimony based on "valuations", which were not shown to have been adopted in accordance with the Administrative Procedure Act and were not adequately supported on these records.

(5) Rejection of complainants' rebuttal Exhibits 68, 69, 70 and 71, which responded to full-year 1972 financial data put in the record by defendants, which

were fully consistent with the complainants' right to close granted by Rule 74 of the General Rules of Practice, and which constituted proper rebuttal.

(6) Denial of subpoenas requested by complainants to obtain relevant evidence in possession of the defendants.

The severance of the complaint case, No. 35720, from the investigation proceedings, No. 35533 et al., was within the power of the Administrative Law Judge to regulate the course of the hearings. Rule 74, General Rules of Practice; and 5 U.S.C. 556, Administrative Procedure Act. The incorporation of any portion of the record in any proceeding other than the one on hearing is subject to objection. Rule 82, General Rules of Practice. Certain portions of the record in one proceeding were incorporated by reference in the other pursuant to rule 82. WBPL and Explorer objected to the incorporation of the entire record. The objections were properly sustained. No necessity existed for such incorporation since each of the records was complete and comprehensive in and of itself. And the complaint case involved reparations for excessive charges in the past which is a matter essentially different from those in the investigation cases. *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U.S. 479 (1914). The objections to the rulings on the severances of the proceedings and the incorporation of the record are overruled.

During the course of WBPL's presentation in No. 35533 et al. counsel for the Shipper Group was granted a subpoena for the appearance of the former Director of the Bureau of Accounts, Interstate Commerce Commission to explain certain correspondence from the Commission bearing the Director's signature. Counsel for the Shipper Group was accorded full opportunity and did inquire fully in respect of the matter contained in the correspondence.

At the conclusion of the inquiry, counsel for the Shipper Group sought to elicit evidence beyond the purpose of the subpoena. Page 770 of the transcript of record shows:

> Judge Dahan: I am asking you now, do you have any question of Mr. Paolo with respect to the purpose for which he was subpoenaed here? If not, I wish to release the witness.
>
> Mr. Cleary: I have questions that I believe are relevant—
>
> Judge Dahan: I am asking the one question. The record shows the purpose for which Mr. Paolo was subpoenaed. Do you have any questions with respect to what the record shows? Do not evade the question....
>
> Mr. Cleary: I have nothing more on that point. I ask for a subpoena to continue Mr. Paolo's testimony regarding recordation and the books of Williams Brothers Pipe Line Company of any figures other than the cost of the carrier originally dedicating the property to public service. That is the subject matter of the letter I have shown counsel from Sullivan and Worcester and have asked to have an identification number assigned to it.
>
> Mr. Bleakney: And I object to further subpoena of this witness. Mr. Cleary at the appropriate time may put in his own case as he sees fit.
>
> Judge Dahan: The objection is sustained.

Counsel for the Shipper Group did not ask to have Mr. Paolo testify in the presentation of the Shipper Group case. The objection to the ruling is overruled.

The valuations were determined by the Commission in Valuation Docket No. 1423, *Williams Bros. Pipe Line Co.*, 338 I.C.C. 549, and report (not printed) decided November 21, 1972, pursuant to the provisions of section 19a of the

act. For the years where actual figures were not available, the best estimates of the valuations for each of the years were determined by procedures of record. The method of estimating Commission valuation produced figures closely approximating those arrived at by the Commission. This was recognized by the Shipper Group's principal witness who stated: "... the valuation process described..., generally reflects the process used by the ICC Valuation Section.... presented valuations... which very closely approximate the ICC Valuations." The witness making the estimated Commission valuation was fully qualified to do so and his reliance upon Commission reports may not properly be questioned. The matter of compliance with the Administrative Procedure Act, 5 U.S.C. 553, in the valuation proceedings is not a matter for consideration here, but must be raised in those proceedings. The objection to the ruling is overruled.

Exhibits 68, 69, 70, and 71 were rejected as not responsive to evidence of defendants in No. 35720. Upon appeal to the Commission, the rejection was upheld by order of June 22, 1973, for the reason that the exhibits do not constitute proper rebuttal. The Commission's action precludes further consideration of the ruling made at the hearing.

During the course of the hearing in No. 35720, counsel for the Shipper Group requested the issuance of subpoenas directed to the presidents or other officers of WBPL and Explorer to make available all the books and records of WBPL and Explorer. The requests were denied. On December 22, 1972, the Shipper Group filed separate petitions with the Commission for subpoenas to compel the presidents of WBPL and Explorer to produce virtually the entire bookkeeping systems of WBPL and Explorer, to which separate replies were filed by WBPL and Explorer on December 28 and 29, 1972. By order of the Commission entered January 15, 1973, the petitions for subpoenas were

denied for the several reasons stated in the order. The Commission's action precludes further consideration of the ruling made at the hearing.

The Parties

WBPL.—WBPL is principally engaged in the transportation of petroleum products. It also handles relatively small volumes of crude oil and liquid fertilizer. The nucleus of its system was constructed in the early 1930's by its predecessor, Great Lakes Pipe Line Company (GLPL), a corporation then owned by eight oil companies. The basic system consisted of 1,238 miles of pipeline extending from refineries at six points in Kansas and Oklahoma to Kansas City, Kans., Des Moines, and Iowa City, Iowa, Omaha, Nebr., Minneapolis, Minn., and Chicago, Ill. Over the years various segments of the original system were looped with one or more parallel lines which could be tied into existing pump station facilities. After World War II a northwest leg, extending from Kansas City to Omaha and on to Grand Forks, N. Dak., was added. In 1965, GLPL had 6,228 miles of pipeline directly connected to 17 refineries and to 14 other pipeline systems. It operated 20 common carrier terminals and connected with 18 shipper-owned terminals. It served 33 shippers and transported 114,884,000 barrels of petroleum products.

WBPL acquired the assets of GLPL on March 29, 1966. By the end of 1971, WBPL had made seven extensions to the system and two additional loop lines, one from Barnsdale, Okla., to Eldorado, Kans., to St. Joseph, Mo., to Des Moines and the other from Des Moines to Mason City, Iowa. At the end of 1971, WBPL had 7,498 miles of pipeline which connected with 14 other pipeline systems. It operated 30 common carrier terminals and connected with 29 shipper-owned terminals. It served 50 shippers and transported 156,846,000 barrels of petroleum products.

Additional data concerning WBPL's organization and operations are set forth in Valuation Docket No. 1423, *Williams Bros. Pipe Line Co., supra.*

Explorer.—Explorer was incorporated on September 27, 1967. It was organized for the purpose of constructing and operating a common carrier pipeline of refined petroleum products from the Gulf to Chicago, Ill. Construction commenced in 1970 and was completed in 1972. The first section of the line became operational on October 26, 1971, from Lake Charles, Port Arthur, and Pasadena to Houston, Grapevine, and Irving, Tex. On January 8, 1972, the line was opened to Tulsa permitting inauguration of joint-line service with WBPL. In late May 1972 the final section into Hammond, Ind., was opened and became operational in late June. Construction of four delivery points in St. Louis, Mo., and Peotone, Ill., continued into the second half of 1972. The system became fully operational in late 1972.

Shipper Group.—OKC Corporation did not introduce any evidence.

American Petrofina Company of Texas operates three refineries and markets refined petroleum products in 24 States. Its primary use of WBPL is from its refinery at El Dorado, Kans. This refinery has a daily capacity of 22,500 barrels of crude oil. The other refineries at Mount Pleasant and Big Springs, Tex., have daily capacities of 26,500 and 60,000 barrels, respectively. In the period from August 23 through December 31, 1970, it shipped 2,429,427 barrels by WBPL on which it paid charges of $923,210. In 1971 its shipments and charges therefor totaled 7,518,891 barrels and $2,737,077. The 1972 figures are said to approximate 1971 totals.

Bell Oil & Gas Company has merged with Vickers Petroleum Corporation which is owned by Swift and Company. Vickers operates a 30,000-barrels-a-day refinery at Ardmore, Okla. (formerly Bell Oil & Gas refinery),

and has about 750 miles of pipeline for gathering crude oil. Refined products are shipped at three-line joint rates from Ardmore via the Bell Oil and Gas Company (a short products line owned by Vickers) to Ardmore Junction, Okla., thence via ARCO Pipe Line Company to Kansas City, and thence via WBPL to some 30 points on the lines of WBPL. The joint rates are named in ARCO Pipe Line Company Joint Tariff No. 166, I.C.C. No. 124. The joint rates in that tariff are not the matter of investigation or complaint here. Bell Oil & Gas and/or Vickers paid WBPL total transportation charges of $414,827.16 and $1,280,491.87 for the transportation of 756,495 and 2,519,601 barrels of petroleum products, respectively, in the periods August 23 through December 31, 1970, and January 1 through December 31, 1971, also respectively. Whether such payments and transportation were covered by the ARCO tariff or the rates at issue here is not of record.

National Cooperative Refinery Association (NCRA) operates a refinery at McPherson, Kans., with a capacity of 45,000 barrels a day. It provides its owner-cooperatives with an organization and operation to supply petroleum products. It distributes its products via WBPL and other pipelines to its owner-cooperatives which then distribute through local cooperatives and ultimately to their individual farm family members. Approximately 30 percent of NCRA is owned by Farmland Industries, approximately 30 percent by Farmers Union Central Exchange, Inc., and approximately 5 percent by Midland Cooperatives, Inc., all of whom are protestants-complainants here. NCRA owns an interest in Jayhawk Pipeline, a crude oil pipeline subject to this Commission's jurisdiction. NCRA paid WBPL total transportation charges of $2,707,348, $5,143,849, and $4,257,607 for the transportation of 5,264,655, 10,079,877, and 7,739,061 barrels, respectively, in the periods, August 23 through December 31, 1970,

January 1 through December 31, 1971, and January 1 through September 30, 1972, also respectively.

CRA, Inc., is a wholly owned subsidiary of Farmland Industries, Inc., with refineries at Coffeyville and Phillipsburg, Kans. The Coffeyville refinery, with a capacity of 32,500 barrels a day, is connected to WBPL. The Phillipsburg refinery, with a daily capacity of 17,500 barrels, is connected to Kaneb Pipe Line. CRA also has a refinery at Scottsbluff, Nebr., with no pipeline connection. It also operates a pipeline common carrier of crude oil. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through September 30, 1972, CRA paid WBPL $1,689,384, $3,145,403, and $2,075,805, respectively, for the transportation of 4,482,402, 8,353,284, and 6,100,000 barrels.

Farmland Industries, Inc., of Kansas City, Mo., is a regional farmer cooperative owned by approximately 2,000 local farmer cooperatives. It has gross sales of over $750 million annually and net income of over $20 million. It owns about 30 percent of NCRA and wholly owns CRA.

Farmers Union Central Exchange, Inc., of St. Paul, Minn., is a regional farmer cooperative owned by local farmer cooperatives. It has gross annual sales of $250 million and owns about 30 percent of NCRA. It also owns an oil pipeline which until recently was operated as a common carrier subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through September 31, 1971, and January 1 through December 31, 1972, it paid WBPL $165,960, $434,920, and $418,419, respectively, for the transportation of 411,688, 1,141,840, and 1,155,188 barrels of refined petroleum products, also respectively.

Kerr-McGee Corporation, of Oklahoma City, Okla., is a diversified natural resources company. In the production and sale of petroleum products it operates a refinery at

Wynnewood, Okla., with a capacity of 33,000 barrels a day. Until recently it also operated a 15,000-barrel-a-day refinery at Cushing, Okla. It owns a pipeline, Kerr-McGee Pipeline Corporation, and has an interest in the White Shoal Pipe Line Corporation, both of which are common carriers subject to this Commission's jurisdiction. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $649,372, $1,454,874, and $1,147,000, respectively, for the transportation of 1,427,622, 3,515,328, 3,171,000 barrels, also respectively.

Midland Cooperatives, Incorporated, of Minneapolis, Minn., operates a refinery at Cushing having a capacity of 17,000 barrels a day. It owns about 5 percent of NCRA. It operates terminals at Madison and Chippewa Falls, Wis., at which it receives and distributes petroleum products which have moved by WBPL. In the periods August 23 through December 31, 1970, January 1 through December 31, 1971, and January 1 through December 31, 1972, it paid WBPL $175,045, $373,843, and $662,166, respectively, for the transportation of 385,480, 919,055, and 1,447,282 barrels of petroleum products.

Rate Issues

History.—When WBPL acquired GLPL it adopted the rates of the latter. GLPL was subject to the maximum-rate order in the Petroleum Rail Shippers case. This order became effective on June 11, 1941, and was vacated on December 1, 1969. From group 3 origins (a ratemaking territory roughly 300 miles around Tulsa) the prescribed maximum rates were 28, 36, 42, 44, 58, and 67 cents a barrel to Kansas City, Kans., Des Moines, Iowa, Omaha, Nebr., Iowa City, Iowa, Minneapolis, Minn., and Chicago, Ill., respectively. The order further directed that additional origin or destination rates in the future bear a proper relationship to these maximum rates.

At the time of the rate prescription, delivery from the pipeline terminals was exclusively by rail tank car. With the advent of World War II, truck loading racks were constructed and by 1942 most deliveries were by motor carrier. At present less than 1 percent of the deliveries out of WBPL's terminals is by railroad. Effective May 2, 1942, a separate terminaling charge of 5 cents a barrel was established for loading and billing truck deliveries. Subsequently this terminaling charge fluctuated in amount and on June 25, 1969, WBPL adjusted its line-haul rates to include the terminaling charge. A comparison of GLPL 1942 rates plus the 5-cent loading and billing charge with the present WBPL rates from group 3 origins to primary destinations is shown in the following table:

From: Group 3 To:	Rates and rate differences in cents per barrel		
	1942	1972	Difference
Kansas City, Kans.	33	30	- 3
Des Moines, Iowa	41	47	+ 6
Omaha, Nebr.	47	47	0
Iowa City, Iowa	49	55	+ 6
Minneapolis, Minn.	63	68	+ 5
Chicago, Ill.	63	51	-12

In 1947, GLPL had 14 destination terminals. At present WBPL's rates to these terminals are on the average 7.93 cents a barrel (0.189 cent a gallon) or 14.7 percent higher than the 1947 rates of Great Lakes. In the same period rail and motor carriers have increased their rates more than 30 percent.

WBPL's first changes in rates were made in the fall of 1967. One of these changes was to reduce its rates from distance-favored origins in group 3 to all destinations and from all group 3 origins to certain destinations. The reduction became effective over the protest of some of the Shipper Group and became the matter of complaint by those protestants. Early in 1969, WBPL restored the prior

rate grouping and the complaint was withdrawn. Since then WBPL has had three basic general-rate increases with certain holddowns for competitive reasons. The last of these increases is the matter of investigation in No. 35533 and subs.

The changed rates.—In general the rates under investigation in No. 35533 and subs are 3 cents (in instances less than 3 cents) a barrel higher than the prior rates. These increases were by flat amounts to maintain historic rate relationships among the various origins. It is a common practice among shippers of petroleum products at such origins to exchange products with one another based upon the pipeline rate differential and are sensitive to changes in rate relationships as evidenced by the shipper reaction to WBPL's 1967 reductions that disturbed the group 3 origin grouping.

WBPL's rates are subject to unnamed points intermediate provisions at origins and destinations. Departures occur in connection with the investigated rates at the intermediate destination points of Columbia, Mo., Eldena (Amboy), Ill., and Iowa City, Iowa, at which relief is sought to maintain higher rates in FSA No. 42327. The fourth-section application involves rates (1) from certain points in Kansas and Oklahoma to Columbia, Iowa City, and Eldena that are higher than rates from the same origins to Rockford, Ill.; (2) from certain points in New Mexico, Texas, Oklahoma, and Kansas to Columbia that are higher than rates from the same origins to St. Charles; and (3) from Borger, Tex., to Columbia and Iowa City that are higher than rates from Borger to St. Charles and Chicago. Fourth-section relief was granted in FSA No. 41861 and FSA No. 42096 in connection with prior rates. The relief sought here is required because of the rate change in No. 35533 and subs. The rates to the intermediate points of Columbia, Iowa City, and Eldena were subjected to the general increase of 3 cents a barrel, but

the rates to the more distant points of St. Charles, Rockford, Peru, and Chicago were not increased because of pipeline and water carrier competition. The relief sought was not protested and no evidence was presented against the granting of the relief.

The initial rates.—The initial joint rates from three points served by Explorer to 45 midwestern destinations served by WBPL under investigation in No. 35540 are uniformly 9.5 cents a barrel less than the combination of Explorer's rates and WBPL's rates.

The assailed rates.—The assailed rates are (1) the rates from points in Oklahoma, Kansas, Nebraska, and Minnesota maintained and applied by WBPL since August 20, 1970, and (2) the initial joint rates maintained and applied by WBPL and Explorer since they became effective January 8, 1972.

Rate comparisons.—The Shipper Group compares WBPL's rates with the rates of certain oil pipelines serving the origin area. The comparisons show that WBPL's rates are on a somewhat higher level than the rates of the compared carriers. The Shipper Group excepted from the comparisons the rates of Kaneb Pipe Line Company. Kaneb is physically adjacent to WBPL and comparable to WBPL in many important respects. Kaneb's rates are shown by WBPL to be on a substantially higher level than WBPL's rates. Of particular significance, no two carriers maintain the same level of rates. Such factors as common carrier or shipper terminals, trunkline or distribution system operations, shipper or independent ownership, pipeline diameter, geographical scope, volume, minimum batch size, and average haul, in addition to commodity and distance, are important in the making of oil pipeline rates. The Shipper Group comparisons do not consider these factors and are of no value in the determination of the issues here. As a matter of

law, rates need not be the same for the same distance over two different carriers. *Interstate Com. Comm'n* v. *Union Pac. R. Co.*, 222 U.S. 541.

Preference and prejudice.—The Shipper Group contends that the WBPL rates unduly prejudice group 3 shippers and unduly prefer shippers served by the Explorer-WBPL joint rates. This contention is predicated upon (1) comparisons of rates, (2) comparisons of ratios of rates to costs, and (3) competition. The comparisons of the rates for comparable distances and on a per barrel mile basis show that the WBPL rates are on a somewhat higher level than the joint rates. Explorer's plant and operations differ in material respects from those of WBPL. The differences account for the maintenance of a lower level of rates by Explorer. The combined Explorer-WBPL factors in the making of the joint rates differ from the WBPL factors in the making of the WBPL rates. The joint rates are necessarily on a lower level than the WBPL rates.

The WBPL rates are not cost related and their ratios to costs differ. This is also true of the joint rates and their ratios to costs. The difference of 9.5 cents a barrel between the joint rates and the combination of Explorer and WBPL rates does not reflect a cost difference. Factors other than costs control this difference. Such factors include a determent to the extension of its pipeline by Explorer, increased load through WBPL's lines tending to reduce WBPL's cost, and water competition. The 9.5 cents a barrel difference accounts for the lower ratios of the joint rates to costs than the WBPL rates to costs.

At the time of the hearings all refiners, including the Shipper Group and those located on the gulf, competed in the sale and marketing of petroleum products in the territory served by WBPL. The Shipper Group continues to enjoy a substantial rate advantage over the gulf refineries to points served by WBPL. The joint rates became

effective on January 8, 1972. The Shipper Group's movements of petroleum products from and to points served by WBPL were substantially the same in 1971 and in 1972. The contentions of the Shipper Group to the contrary notwithstanding, the shippers in the Shipper Group have not been affected by the joint rates. And in the present energy crisis even a claim of competition by refiners would be ludicrous.

Discrimination.—The Shipper Group contends that WBPL discriminates against group 3 shippers and against nonowners of Explorer in violation of section 2 of the act. The Shipper Group claims that WBPL gives Explorer an advantage by joint rates which are 9.5 cents a barrel lower than the combination rates and argues that since Explorer is shipper owned, the advantage to Explorer is a discrimination in favor of Explorer's shipper-owners. The wrong prohibited by section 2 is a discrimination between shippers. *Wight* v. *United States*, 167 U.S. 512. Explorer is a separate entity of its shippers. It is a common carrier and its arrangements with WBPL are not matters within the purview of section 2. WBPL accords all group 3 shippers the same treatment in rates and service. Explorer accords all shippers using its local service the same treatment in rates and service. Explorer and WBPL accord all shippers using their joint service the same treatment in rates and service.

Rate Base

WBPL placed its chief emphasis upon figures related to a valuation (fair value) rate base. It also presented evidence using its book net investment as a rate base. The Shipper Group seeks the adoption of a depreciated original cost rate base. The matter of defects in the Commission's valuation process raised by the Shipper Group has no place here. The valuation process pursuant to section 19a has

been employed by the Commission for many years and on railroad and pipeline valuations has withstood many challenges. Any question involving the valuation process should be determined in a rulemaking proceeding at which all affected persons are allowed to present their views.

This Commission is generally free from any specific formula or rule which controls the determination of a rate base. The number of proceedings involving pipeline rates has been limited. In such proceedings the Commission has evaluated earnings to property valuations made under section 19a. *Petroleum Rail Shippers'* case, *supra; Minnelusa Oil Corp.* case, *supra; Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115, 141-143 (1940) and 272 I.C.C. 375 (1948). The consistent past use of a valuation rate base for oil pipelines was recognized by the Commission in *Uniform System of Accounts for Pipeline Companies*, 337 I.C.C. 518, 523 (1970).

There was a time when a valuation rate base was required. *Smyth* v. *Ames*, 169 U.S. 466 (1898). Although the requirement has been eliminated, there is no legal impediment to the use of such a rate base. In its administration of the Interstate Commerce Act, the Commission must consider all the elements of value detailed in section 19a. The valuations made under section 19a are prima facie evidence of value for all purposes arising under the act. Under the present law a carrier may show the value of its property and the rate of return thereon in any ratemaking proceeding before this Commission.

In addition to its historical use, a fair value (valuation) rate base is a workable method for preventing capital exhaustion and for coping with attrition of earnings. Capital exhaustion occurs when the purchasing power of the dollars recouped through depreciation is less than the value of the capital originally invested by the

company in plant and equipment. Under such circumstances depreciation dollars do not produce enough funds to replace the equipment or facilities being depreciated. A fair value rate base can meet this problem by reflecting changes in the purchasing power of the dollar. Attrition of earnings is due, in part, to a situation wherein the current cost is greater than the average cost of constructing plant and equipment and as a company adds to its plant and equipment it finds its earnings will be undercut by attrition unless compensated for. Attrition of earnings can also be due to increases in customer requirements for service that requires additional plant to be constructed with insufficient or no increase in revenue forthcoming to prevent attrition taking place. Attrition of earnings can also occur because of increasing cost of doing business not related to plant and equipment, such as increases in wages and taxes.

While WBPL admits that sound regulation can be practiced in original cost jurisdictions, it objects to the implication by the Shipper Group that unsound regulatory practice would result from using any rate base other than original cost. The basic fallacy in the Shipper Group's arguments against the use of a fair value rate base is a failure to recognize that it is the "end result" of the regulatory process that determines whether a rate decision is legally sound and not the individual pieces that go into the make-up of that decision. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co.* v. *Public Serv. Commission*, 262 U.S. 6/9 (1923). The Shipper Group's arguments that nothing but an original cost base will do because (1) it is easier; (2) it is less likely to lead to the impairment of a utility's financial integrity; and (3) valuation procedures might result in "windfalls" to the equity holder and interfere with the investment process, are based upon surmise rather than fact. The use of an

original cost rate base may not necessarily be easier than a valuation rate base and even if easier this is not a proper criterion for determining whether a particular kind of rate base should be used. Based upon actual studies, WBPL shows that it is not true that an original cost rate base is less likely to lead to the impairment of a utility's financial integrity. Also based on actual studies, WBPL refutes the "windfall" arguments against a valuation rate base and points out that the Commission's valuation only partially reflects inflation since it considers both the original cost to the first investor and the reproduction cost new, not just the latter.

The end result of a rate proceeding must be accompanied by findings which support the reasonableness of that result. Such findings should include not only the rate base, but an amount of return, expressed in dollars or in a percentage relation to the rate base. The determination of an amount of return is not a readily determinable value and often varies in order to compensate stockholders for changes in the value of money.

The generally accepted desirable attributes of a rate base are (1) it should be readily determinable as of any date; (2) it should remain stable regardless of fluctuations in construction cost; (3) it should be readily defended as to correctness of amount in court actions; (4) its use should result in reasonably stable rates; (5) it should serve as a guide not only for the determination of rates, but for the issuance of securities and for authorization of purchase and sale of property; and (6) its use should result in justice to both the owner and its shippers. The final valuations of this Commission meet these attributes. Since the final value figure is determined on an annual basis, the rate base is readily determinable as of any date. The consideration of all elements of value rather than a single element makes for reasonable stability in the rate base. Any fluctuation will normally be due to the addition or

retirement from the plant. Illustrative is WBPL's final value for the years 1966 through 1972:

Year	Final value	Difference	Original cost change in plant
1966	$167,605,000	Basic	—
1967	171,254,000	$ 3,649,000	$ 7,855,000
1968	193,282,000	22,028,000	22,291,000
1969	193,683,000	401,000	3,799,000
1970	209,500,000	15,817,000	9,747,000
1971	222,267,000	12,767,000	10,808,000
1972	224,888,000	2,621,000	2,176,000
		$57,283,000	$56,676,000

The foregoing illustrates that except for the changes in the plant the rate base would have remained fairly stable. This is principally true because the increase due to inflation is offset mostly by the decrease due to depreciation. And as stated above, the Commission methodology of determining valuations has withstood the test of time and the challenges of the railroads and pipelines. The fair value rate base here meets the end-result doctrine of the *Hope Natural Gas* case, *supra*. On the other hand, the proposed depreciated original cost should not be used here. The Shipper Group admits that the use of depreciated original cost as a rate base would result in a rate reduction which would not leave WBPL enough to pay its fixed charges. Also, the Commission has permitted WBPL to record on its book the price actually paid and to accrue depreciation expense on this actual investment. *Uniform System of Accounts for Pipeline Companies, supra*. In that proceeding, it also noted that the rate of return for pipelines is customarily determined not by investment as shown on the carrier's books, but rather on the basis of the Commission's valuation.

Acceptance of the fair value rate basis makes it unnecessary to further consider WBPL's alternate proposal to use purchase cost as the proper basis which differs from the original cost base only by the acquisition adjustment cost.

Costs

WBPL determined its costs by dividing the total system operating expenses, rents and taxes, other than income taxes, plus a capital cost component, by the total barrel-miles of products handled for 1971 and 1972. It computed the capital costs by applying the average rate of interest paid on its outstanding debt (5.96 percent for 1971 and 5.98 percent for 1972) to the average net valuation (ILLEGIBLE COPY for 1971 and $227,015,000 for 1972). To the valuation it applied rates of return of 8.13 and 8.31 percent for 1971 and 1972, respectively. These rates of return are composite rates resulting from using the debt to equity proportions times the interest rate and a 14 percent return on equity which it considers necessary and representative of a fair rate of return for the carrier. In 1971, debt represented 73 percent and equity represented 27 percent of the capital structure. In 1972, the proportions were 71 percent debt and 29 percent equity.

The combined operating costs plus the system capital costs divided by the total barrel-miles of products which moved during the year produced per barrel-mile costs which were multiplied by the mileages from Tulsa to give costs per barrel at destination. In appendixes A and B hereto are WBPL's comparisons of rates to the 1972 cost levels, the ratios of rates to costs, and the weighted average ratio of rate to cost based on the volume of movement to the various destinations. The costs do not include an allowance for Federal income taxes which WBPL considers necessary.

Explorer's costs were based on forecasts because it was not fully operational until late 1972. The Explorer costs were added to the WBPL costs. The full costs considered, the joint-line rates provide some return to the carriers. There is no real dispute between the parties concerning the compensativeness of the joint rates. The Shipper

Group which has the burden of proof concedes that the level of the joint rates is reasonable, is related properly to cost, and appears to be fair.

The Shipper Group based its cost evidence on a showing of the cost of capital using the original cost less depreciation. The substitution of original cost for valuation reduced the basis for computation of the capital cost component from $227,015,000 to $101,594,000.

From a cost of service standpoint the composite capital cost return percentage of 8.31 percent used in appendix B is inappropriate. The appropriate method of determining the capital cost component ratio provided here would be through the use of the 5.98 percent which reflects the average rate of interest paid in 1972 on the outstanding debt of WBPL.

WBPL computed various rates of return, including and excluding Federal income tax, which show that the rate of return used in its cost study was conservative and that its rate of return has not increased since 1967 but has remained fairly constant. A comparison of the rates of return earned by WBPL with those earned by various other pipelines shows that WBPL's return on the valuation is below the returns earned by other pipelines.

From a cost of service viewpoint WBPL's 1972 operating expenses and the use of 5.98 percent capital cost factor applied on the fair value rate base is the best measurement of the reasonableness of the rates.

Summary and Findings

Except for the short period when group 3 was temporarily broken, WBPL has maintained the rate relationship which had been in existence for many years by its predecessor. None of the shippers in the Shipper Group question WBPL's rate structure. The Shipper

Group's economic witness, however, expressed the view that each rate for each service should bear a uniform share of the burden of the total cost, including capital cost, and that any rate below that line is predatory and any rate above that line is monopolistic. The witness knows of no transportation company or utility with such a rate structure. There is no legal requirement that the same percentage of profit be secured from each type of service of a transportation company. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585, 598-99 (1915). Moreover, there is no single point of reasonableness of a given rate, but that a zone of reasonableness exists. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935); *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 814 (1973).

The rate comparisons attacking the rate level of the rates maintained by WBPL are inconclusive and here they fail once the overall earnings level of WBPL has been found to be reasonable. Such a finding is inescapable on the record made. WBPL's earnings have not been excessive at any time since its acquisition of the pipeline properties. With the acceptance of the Commission's valuation as a rate base, the argument of the Shipper Group that the rates maintained and applied by WBPL since August 20, 1970, have been unreasonably high falls flat. The Shipper Group's argument that WBPL supports its purchase price by increasing its rates is also without foundation. On a *pro forma* basis, assuming no sale to WBPL, the return on valuation would have been less in 1972 than in any year 1962 through 1967.

The joint rates are compensatory. The Shipper Group's argument that these rates burden traffic moving at WBPL's rates runs to its assertations of preference and prejudice. In this respect, the Shipper Group admits that the joint rates are fair and does not want them raised. What the Shipper Group seeks is a reduction in the just

and reasonable rates maintained by WBPL. The reduction sought, of about 30 percent, however, would result in substantially lower Explorer-WBPL rate combinations than the joint rates which the Shipper Group concede to be fair. The disparity between the level of WBPL's rates and the joint rates is shown to be warranted and does not support a finding of preference and prejudice. *Southeastern Assn. of R. & Util. Commrs.* v. *A. T. & S. F. Ry. Co.*, 321 I.C.C. 519, 545 (1964). WBPL's rates are substantially lower than the joint rates to the same destinations. No competitive advantage accrues to shippers at the joint rates and no showing of injury is made. *Public Belt Railroad Commission* v. *Aberdeen & R. R. Co.*, 335 I.C.C. 162, 175 (1969). As to the issue of discrimination under section 2, the contentions of the Shipper Group are untenable. There is no showing of any discrimination between shippers.

The present application for fourth-section relief is merely a technical updating to reflect the rate increases. The basic question whether relief should be granted has been decided in the past. The rates for which the relief is now sought are cost-justified, no lower than necessary to meet water competition, and consistent with historically maintained rate relationships approved by the Commission.

I find:

(1) That in No. 35533, No. 35533 (Sub-No. 1), and No. 35533 (Sub-No. 2), the increased pipeline rates on petroleum products from and to points in the Southwest and Midwest are just and reasonable and otherwise lawful;

(2) That in fourth-section application No. 42327 authority should be granted to establish and maintain the increased pipeline rates on petroleum products from certain points in New Mexico, Texas, Oklahoma,

and Kansas to certain points in Illinois, Iowa, and Missouri without observing the long-and-short-haul provisions of the Interstate Commerce Act;

(3) That in No. 35540, the initial pipeline joint rates on petroleum products, from Lake Charles, La., and Port Arthur, and Pasadena, Tex., to points in the Midwest have not been shown to be unjust and unreasonable and otherwise unlawful;

(4) That in No. 35720, the assailed pipeline rates on petroleum products from and to the Southwest and Midwest have not been shown to be unjust and unreasonable and otherwise unlawful.

It is ordered, That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service hereof; that the proceedings in No. 35533, No. 35533 (Sub-No. 1), No. 35533 (Sub-No. 2), and No. 35540 be, and they are hereby, discontinued; that the complaint in No. 35720 be, and it is hereby, dismissed; and that the following fourth-section order No. 20281 be entered:

Fourth Supplemental Fourth Section Order No. 20281
PIPELINE RATES—PETROLEUM PRODUCTS
FROM THE SOUTHWEST

It is ordered, That applicants in fourth-section application No. 42327 be, and they are hereby, authorized to establish and maintain, over their direct pipeline routes, for the transportation of petroleum products, from and to points named in the application, rates named in the application, and to maintain higher rates to Intermediate points; Provided, That rates to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission, nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

Dated at Washington, D.C., this 24th day of May 1974.

By the Commission, George A. Dahan, Administrative Law Judge.

(SEAL)

ROBERT L. OSWALD,
Secretary.

APPENDIX A

Ratio of Rate to Cost

From Tulsa, Okla. To	Cents per barrel			
	Miles	Cost[1]	Rate	Ratio[2]
Alexandria, Minn.	800	63	76	1.21
*Bethany, Mo.	337	27	36	1.33
*Bettendorf, Iowa	601	47	52	1.11
*Chippewa Falls, Wis.	749	59	66.5	1.13
Columbia, Mo.	351	28	44	1.57
Des Moines, Iowa	427	34	47	1.38
Doniphan, Nebr.	512	40	44	1.10
Dubuque, Iowa	604	48	61	1.27
*Duluth, Minn.	830	65	72	1.11
*Eldena (Amboy), Ill.	649	51	47.5	.93
Fargo, N. D.	904	71	85	1.20
Ft. Dodge, Iowa	508	40	57	1.43
Grand Forks, N. D.	979	77	92	1.19
*Grand Forks (Western), N.D.	979	77	84	1.09
Iowa City, Iowa	534	42	55	1.31
*Lincoln, Nebr.	423	33	33	1.00
Mankato, Minn.	627	49	64	1.31
Marshall, Minn.	675	53	69	1.30
Mason City, Iowa	538	42	57	1.36
Milford, Iowa	598	47	58	1.23
Minneapolis:				
Transfer Point	687	54	68	1.26
* Roseville	687	54	68	1.26
* Minn. St. Paul Int'l.	661	52	75	1.44
Omaha, Nebr.	441	35	47	1.34
Palmyra, Mo.	439	35	50	1.43
Rochester, Minn.	726	57	64	1.12
Sioux City, Iowa	517	41	57	1.39
Sioux Falls, S. D.	595	47	63	1.34
*Superior, Wis.	843	66	71	1.08
Waterloo, Iowa	532	42	59	1.40
Watertown, S. D.	746	59	75	1.27
Wausau, Wis.	837	66	82	1.24
*Wrenshall, Minn.	823	65	72	1.11
Weighted average				1.27

* No terminaling services included.

[1] Computed by multiplying mileage by cost per barrel of 0.07867 cent.

[2] Cost includes capital costs of 5.98 percent.

APPENDIX B

Ratio of Rate to Cost

From Tulsa, Okla. To	Cents per barrel			
	Miles	Cost[1]	Rate	Ratio[2]
Alexandria, Minn.	800	70	76	1.09
*Bethany, Mo.	337	30	36	1.20
*Bettendorf, Iowa	601	53	52	.98
*Chippewa Falls, Wis.	749	66	66.5	1.01
Columbia, Mo.	351	31	44	1.42
Des Moines, Iowa	427	37	47	1.27
Doniphan, Nebr.	512	45	44	.98
Dubuque, Iowa	604	53	61	1.15
*Duluth, Minn.	830	73	72	.99
*Eldena (Amboy), Ill.	649	57	47.5	.83
Fargo, N. D.	904	79	85	1.08
Ft. Dodge, Iowa	508	45	57	1.27
Grand Forks, N. D.	979	86	92	1.07
*Grand Forks (Western), N.D.	979	86	84	.98
Iowa City, Iowa	534	47	55	1.17
*Lincoln, Nebr.	423	37	33	.89
Mankato, Minn.	627	55	64	1.16
Marshall, Minn.	675	59	69	1.17
Mason City, Iowa	538	47	57	1.21
Milford, Iowa	598	52	58	1.12
Minneapolis:				
Transfer Point	687	60	68	1.13
* Roseville	687	60	68	1.13
* Minn. St. Paul Int'l.	661	58	75	1.29
Omaha, Nebr.	441	39	47	1.21
Palmyra, Mo.	439	38	50	1.32
Rochester, Minn.	726	64	64	1.00
Sioux City, Iowa	517	45	57	1.27
Sioux Falls, S. D.	595	52	63	1.21
*Superior, Wis.	843	74	71	.96
Waterloo, Iowa	532	47	59	1.26
Watertown, S. D.	746	65	75	1.15
Wausau, Wis.	837	73	82	1.12
*Wrenshall, Minn.	823	72	72	1.00
Weighted average				1.15

* No terminaling services included.

[1] Computed by multiplying mileage by cost per barrel of 0.08766 cent.

[2] Cost includes capital costs of 8.31 percent.

OH

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

No. 35533[1]

PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY

June 12, 1974

NOTICE TO THE PARTIES:

On June 6, 1974, an initial decision by George A. Dahan, Administrative Law Judge, in the above-entitled proceeding was served on the parties.

On page 21 paragraph 3 line 7 following "1972) to the" the words *average Net* should be inserted. Following the word "valuation" which is on the same line 7 "*(279,169,167*" is incorrect. It should read: "*($213,954,000*"

PLEASE CORRECT YOUR COPIES ACCORDINGLY.

ROBERT L. OSWALD,
Secretary.

[1] This also embraces No. 35533 Sub Nos. 1 & 2, No. 35540, No. 35720 and FSA 42327

Interstate Commerce Commission
Washington, D.C. 20423

I, H. G. HOMME, JR., Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Notice dated September 23, 1977 in Docket No. Suspension Case No. 67214, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 9th day of August, A.D. 1978.

H. G. HOMME, JR.
ACTING SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

Suspension Case No. 67214

September 23, 1977

NOTICE:

Division 2, acting as an appellate division, Commissioners Murphy, MacFarland, and Clapp, voted today not to suspend protested pipeline common carrier schedules naming increased rates applicable on the transportation of petroleum products from origins in Louisiana, Kansas, Nebraska, Oklahoma and Texas to destinations in the Midwest, as published in Supplement 6 to Tariff No. 3-B, ICC No. 10, and Supplement 4 to Tariff No. 1-A, ICC No. 12, of the Williams Pipe Line Company, Tulsa, Oklahoma, to become effective September 25, 1977. Commissioner Clapp voted to grant the appeal and suspend.

The Suspension and Fourth Section Board Members Fitzgerald and O'Malley, had concluded not to suspend and the action of Division 2 followed reconsideration of the Board's action. Member Halvarson had not participated.

H. G. HOMME, JR.
Acting Secretary

Interstate Commerce Commission
Washington, D.C. 20423

I, H. G. HOMME, JR., Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Order of the Commission entered September 21, 1977, in Docket No. Fourteenth Supplemental Fourth Section Order No. 20281, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 9th day of August, A.D. 1978.

H. G. HOMME, JR.
ACTING SECRETARY OF THE
INTERSTATE COMMERCE
COMMISSION

Fourteenth Supplemental Fourth Section Order No. 20281

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Suspension and Fourth Section Board, held at its office in Washington, D.C., on the 21st day of September, 1977.

PIPELINE RATES—PETROLEUM PRODUCTS FROM THE SOUTHWEST

By fourth-section application No. 43419, Williams Pipe Line Company, for and on behalf of itself and carriers parties to its tariffs Nos. 4, 6 and 3-B, I.C.C. Nos. 5, 8 and 10, respectively, according as they may participate in the traffic, applies for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. A full investigation of the matters and things involved in the application having been made, and upon further consideration of fourth-section order No. 20281, entered February 6, 1970, in application No. 41861, as amended, as modified and amended by supplemental orders entered in other applications from time to time, which applications and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 20281, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraphs:

It is further ordered, That, effective September 25, 1977, applicants herein be, and they are hereby, authorized to establish and maintain, over their direct pipeline routes, for the transportation of petroleum products and unleaded gasoline, as described in the application, from origins in Kansas and Oklahoma, to

Chicago (Franklin Park) and Peru, Ill., Milford, Iowa, and St. Charles, Mo., rates provided in items 185-E and 220-E of supplement 6 to the aforenamed tariff No. 3-B, I.C.C. No. 10, and to establish and maintain on like property from the same origins to intermediate Eldena (Amboy Terminal), Ill., Iowa City and Sioux City, Iowa, and Columbia and Greenwood, Mo., higher rates provided in said items 185-E and 220-E, all to the extent proposed in the application; *Provided*, That rates to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That, effective September 25, 1977, applicants herein be, and they are hereby, authorized to establish and maintain, over their direct pipeline routes, for the transportation of petroleum products and unleaded gasoline, as described in the application, from origins in Kansas, New Mexico, and Texas, to St. Charles, Mo., rates provided in items 275-C and 280-C of supplement 6 to the aforenamed tariff No. 3-B, I.C.C. No. 10, and to establish and maintain on like property from the same origins to intermediate Columbia, Mo., higher rates as provided in said items, all as proposed in the application; *Provided*, That rates to such higher-rated intermediate point shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That, effective September 25, 1977, applicants herein be, and they are hereby, authorized to establish and maintain, over their direct pipeline routes, for the transportation of petroleum products and unleaded gasoline, as described in the

application, from Ardmore, Okla., to Chicago (Franklin Park), Ill., and St. Charles, Mo., rates provided in items 175-F and 180-F of supplement 6 to the aforenamed tariff No. 6, I.C.C. No. 8, and to establish and maintain on like property from the same origin to intermediate Iowa City (Coralville), Iowa, and Columbia, Mo., higher rates provided in said items 175-F and 180-F, all to the extent proposed in the application; *Provided*, That rates to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

And it is further ordered, That, on the effective date of the rates as to which relief is sought herein, applicants herein be, and they are hereby, authorized to establish and maintain, over their direct pipeline routes, for the transportation of petroleum products and unleaded gasoline, as described in the application from Borger, Tex., to Chicago (Franklin Park), Ill., and St. Charles, Mo., rates provided in items 175-F and 180-G of supplement 12 to the aforenamed tariff No. 4, I.C.C. No. 5, and to establish and maintain on like property from the same origin to intermediate Eldena (Amboy Terminal), Ill., Iowa City (Coralville), Iowa, and Columbia, Mo., higher rates provided in said items 175-F and 180-G, all to the extent proposed in the application; *Provided*, That rates to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

This decision is not a major Federal action significantly affecting the quality of the human environment.

By the Commission, Suspension and Fourth Section Board, Members Fitzgerald, Halvarson, and O'Malley. Member Halvarson not participating.

H. G. HOMME, JR.,
Acting Secretary

(SEAL)

Department of Justice

ENERGY: IS REGULATION THE ANSWER OR THE PROBLEM?

Remarks by

JOHN H. SHENEFIELD
Assistant Attorney General
Antitrust Division

Before The

Natural Resources Law,
Administrative Law and
Public Utility Law Sections
of the
American Bar Association

St. Regis-Sheraton
New York City

August 8, 1978

I'm delighted to have the opportunity to talk to you today on competition and energy. I think it is fair to say that this is one of the "hot" public policy areas today. The Antitrust Division is certainly devoting more and more resources to this area—not only because of its intrinsic importance but also because of the increasing amount of government involvement in the energy industries.

Today, I want to talk briefly about what we are doing in this field and then turn to what to me is becoming a matter of overriding concern—the extent and purpose of government regulation in this area. We in the Antitrust Division are advocates for competition, and we are concerned about competitive restraints wherever found. I believe that, if today's trends continue, there is a serious possibility that public restraints through regulation will, in the long run, pose a threat to competition and consumer interests in the energy industries at least as important as private anticompetitive behavior.

As you will see, this somewhat alarming possibility does not rest on a conclusion that there are no competitive problems in energy arising out of private conduct. To the contrary, we see serious competitive issues—some structural, some conduct—in the various energy industries. But the growth, both in amount and scope, of government regulation in this area is enormous, and it is this trend that I find particularly disturbing. It is also much more frustrating, since unlike private illegal conduct that we can only police and prosecute, what we are dealing with on the public side is fully within our theoretical ability to prevent. In some ways, our enforcement efforts are being steadily undercut by other governmental actions that risk creating the very kinds of competitive costs we are trying to prevent.

First, let me give you a brief overview of our activities. To put this in context, I should start with my decision

last November that the Division needed to consolidate responsibility for all of its energy-related activity. As a result, a new Energy Section was created. By centralizing responsibility, I believe we have significantly improved our ability to identify relevant issues and to attack them in a coherent, systematic way.

Since its inception, the Energy Section has worked on a large (and continually growing) number of projects. These issues arise in a number of contexts—enforcement, regulatory, legislative, and within the Executive Branch. They cover a wide range of topics and degrees of complexity.

* * * * *

In addition to these and other enforcement activities, we have spent very large amounts of time and effort on various aspects of pipeline ownership and regulation. We believe that there are serious competitive problems in both the crude oil and petroleum product markets in the United States that arise from the ownership and current scheme of regulation of petroleum pipelines.

In part, this is because regulation has failed to confine pipeline tariffs to reasonable levels. Indeed, regulation may well be inherently incapable of preventing an integrated oil company from using the natural monopoly power of its pipeline to evade regulation. Thus, the ownership of a pipeline may be crucial to competition, and divestiture may well be the only answer to the problem.

This is a very live issue before Congress. Indeed, we recently testified before Senator Kennedy's Antitrust and Monopoly Subcommittee, stating our view that a strong case can now be made for prospective pipeline divestiture, and that retrospective divestiture merits serious consideration. But we also argued that, to be effective, any pipeline divestiture must first be preceded by general rate

reform in the pipeline industry. Otherwise, any divestiture of existing lines would simply result in capitalized monopoly profits for the purchaser of the divested line. The Williams Brothers Pipeline case is an example of this dynamic. In 1966 Williams paid about $280 million for a pipeline system—the Great Lakes Pipeline Company—whose net original cost was only $100 million, and whose ICC valuation rate base was $160 million. That extra $120-180 million is a preview of what kinds of prices you would see if divestiture requirements preceded rate reform.

Of course, true rate reform would prevent all pipelines, vertically integrated or independent, from obtaining monopoly profits *at the pipeline level.* Absent rate reform, even independently owned pipelines would have both the incentive and ability to capture in the tariff whatever excessive profits are allowed by imperfect rate regulation. If shippers are prohibited from sharing in these profits, they are likely to be most reluctant to guarantee the use of independent lines—a possibility that could impede the construction of new transportation facilities.

Because of this view as to the necessary order of things, we have focused much of our recent pipeline efforts on the rate reform front, specifically a FERC rulemaking to consider broad reforms in pipeline ratemaking methodology, and the FERC adjudication of just and reasonable rates for the Trans-Alaska Pipeline System (TAPS). We have already met with considerable success in both proceedings: the initial tariffs of the TAPS carriers were suspended—an action upheld by the Supreme Court[4]; in the rulemaking, at our request the full Commission has overturned the Administrative Law

[4] Trans-Alaska Pipeline Rate Cases, 46 U.S.L.W. 4587 (U.S. June 6, 1978).

Judge's overly narrow construction of the issues and is considering petitions properly to structure that proceeding[5]; and, in the Williams Brothers rate case, the D.C. Court of Appeals has adopted our view that the FERC need not follow the outmoded methods used by the ICC to regulate oil pipelines.[6]

I cannot overstate the significance of these proceedings from a competitive perspective. To the extent that rate regulation has been ineffective, the results are much like what would occur if all domestic pipelines had engaged in an industry-wide price-fixing conspiracy. In terms of economic impact, these proceedings are one of our major efforts.

* * * * *

[5] Order Modifying Presiding Administrative Law Judge's Order Requiring Briefs, Federal Energy Regulatory Commission, Docket No. RM78-2 (formerly Ex Parte No. 308) (March 13, 1978).

[6] Farmers Union Central Exchange, et al v. Federal Energy Regulatory Commission, No. 76-2138 (D.C. Cir. June 27, 1978).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2138 September Term, 1977

FARMERS UNION CENTRAL EXCHANGE,
ET AL,

Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA,

Respondents

WILLIAMS PIPE LINE CO.
EXPLORER PIPELINE CO.

Intervenors

BEFORE: McGowan, Leventhal and Wilkey, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by intervenor Explorer Pipeline Company, it is

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

By:
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2138 September Term, 1977

FARMERS UNION CENTRAL EXCHANGE,
ET AL,

Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA,

Respondents

WILLIAMS PIPE LINE CO.
EXPLORER PIPELINE CO.

Intervenors

BEFORE: McGowen, Leventhal and Wilkey, Circuit Judges

ORDER

Upon consideration of the motion filed by intervenor Williams Pipe Line Co. for stay of mandate, and of the oppositions filed by petitioners and respondent Commission, it is

ORDERED by the Court that intervenor's motion is granted and the Clerk is directed not to issue the mandate in this case prior to September 1, 1978.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

STATUTORY APPENDIX

APPENDIX

STATUTORY PROVISIONS

Interstate Commerce Act, Title 49 U.S.C.

Preceding Sections 1, 301, 901, and 1001. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal System, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

• • •

SECTION 1(5)(a). All charges made for any services rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part.

• • •

SECTION 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any

special rate, rebate, drawback, or other device, charge, demand, collect, or received from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

• • •

SECTION 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier whatever description.

• • •

SECTION 4(1). It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like and kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission

shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this part, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

• • •

SECTION 13(1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such mannered and by such means as it shall deem proper.

• • •

SECTION 15(1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for in-

vestigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

• • •

SECTION 15(7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commis-

sion shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing or its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes

effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this part.

• • •

SECTION 16(1). That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

• • •

SECTION 19a. (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this part, except any street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Comission may in its discretion investigate, ascertain, and report the value of the property owned or used by any such electric railway subject to the provisions of this part whenever in its judgment such action is desirable in the public interest. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Com-

mission shall, subject to the exception hereinbefore provided for in the case of electric railways, make an inventory which shall list the property of every common carrier subject to the provisions of this part in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) *First.* In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reporduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary,

shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

(c) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that con-

stitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this part and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this part shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

(f) Upon completion of the original valuations herein provided for, the Commission shall thereafter keep itself informed of all new construction, extensions, improve-

ments, retirements, or other changes in the condition, quantity, use, and classification of the property of all common carriers as to which original valuations have been made, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of railroad properties, in order that it may have available at all times the information deemed by it to be necessary to enable it to revise and correct its previous inventories, classifications, and values of the properties; and when deemed necessary, may revise, correct, and supplement any of its inventories and valuations.

(g) To enable the Commission to carry out the provisions of the preceding paragraph, every common carrier subject to the provisions of this part shall make such reports and furnish such information as the Commission may require.

(h) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered mail or by certified mail to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of

this part the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(j) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If

the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

(k) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

(l) That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

Administrative Procedure Act, Title 5 U.S.C.

SECTION 551(4)-(7). (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

• • •

SECTION 553. (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

• • •

SECTION 554. (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportu-

nity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a members or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

SECTION 556. (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance

with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

SECTION 557. (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and

timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

SECTION 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Department of Energy Organization Act, Title 42 U.S.C.

SUBCHAPTER I—DECLARATION OF FINDINGS AND PURPOSES

SECTION 7111. **Congressional findings**

The Congress of the United States finds that—

(1) the United States faces an increasing shortage of nonrenewable energy resources;

(2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;

(3) a strong national energy program is needed to meet the present and future energy needs of the Nation consistent with overall national economic, environmental and social goals;

(4) responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs; and

(5) formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch.

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SUBCHAPTER IV—FEDERAL ENERGY REGULATORY COMMISSION

SECTION 7171. Appointment and administration

Federal Energy Regulatory Commission; establishment

(a) There is hereby established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

Composition; term of office; conflict of interest

(b) The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of four years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The terms of the members first taking office shall expire (as designated by the President at the time of appointment), two at the end of two years, two at the end of three years, and one at the end of four years. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve for more than one year after the date on which his term would otherwise expire under this subsection. Members of the Commission shall not engage in any other business, vocation, or employment while serving on the Commission.

Duties and responsibilities of Chairman

(c) The Chairman shall be responsible on behalf of the Commission for the executive and administrative

operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of Title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of Title 5. The Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out its functions.

Supervision and direction of members, employees, or other personnel of Commission

(d) In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

Designation of acting Chairman; quorum; seal

(e) The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present.

The Commission shall have an official seal which shall be judicially noticed.

Rules

(f) The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions.

Powers of Commission

(g) In carrying out any of its functions, the Commission shall have the powers authorized by the law under which such function is exercised to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate. The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions, except that nothing in this subsection shall be deemed to supersede the provisions of section 556 of Title 5 relating to hearing examiners.

Principal office of Commission

(h) The principal office of the Commission shall be in or near the District of Columbia, where its general sessions shall be held, but the Commission may sit anywhere in the United States.

Commission deemed agency; attorney for Commission

(i) For the purpose of section 552b of Title 5 the Commission shall be deemed to be an agency. Except as provided in section 518 of Title 28, relating to litigation

before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law.

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SECTION 7172. **Jurisdiction of Commission**

Transfer of functions from Federal Power Commission

(a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:

(A) the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under part I of the Federal Power Act;

(B) the establishment, review and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

(C) the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas company under sections 1, 4, 5, and 6 of the Natural Gas Act;

(D) the issuance of a certificate of public convenience and necessity, including abandonment of facilities or services, and the establishment of physical connections under section 7 of the Natural Gas Act;

(E) the establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments, under the Natural Gas Act; and

(F) the regulation of mergers and securities acquisition under the Federal Power Act and Natural Gas Act.

(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

Transfer of functions from Interstate Commerce Commission

(b) There are hereby transferred to, and vested in, the Commission all functions and authority of the Interstate Commerce Commission or any officer or component of such Commission where the regulatory function establishes rates or charges for the transportation of oil by pipeline or establishes the valuation of any such pipeline.

Consideration of proposals made by Secretary to amend regulations issued under section 753 of Title 15; exception

(c)(1) Pursuant to the procedures specified in section 404 and except as provided in paragraph (2), the Commis-

sion shall have jurisdiction to consider any proposal by the Secretary to amend the regulation required to be issued under section 4(a) of the Emergency Petroleum Allocation Act of 1973 which is required by section 8 or 12 of such Act to be transmitted by the President to, and reviewed by, each House of Congress, under section 551 of the Energy Policy and Conservation Act.

(2) In the event that the President determines that an emergency situation of overriding national importance exists and requires the expeditious promulgation of a rule described in paragraph (1), the President may direct the Secretary to assume sole jurisdiction over the promulgation of such rule, and such rule shall be transmitted by the President to, and reviewed by, each House of Congress under section 8 or 12 of the Emergency Petroleum Allocation Act of 1973, and section 551 of the Energy Policy and Conservation Act.

Matters involving agency determinations to be made on record after agency hearing

(d) The Commission shall have jurisdiction to hear and determine any other matter arising under any other function of the Secretary—

(1) involving any agency determination required by law to be made on the record after an opportunity for an agency hearing; or

(2) involving any other agency determination which the Secretary determines shall be made on the record after an opportunity for an agency hearing,

except that nothing in this subsection shall require that functions under sections 105 and 106 of the Energy Policy and Conservation Act shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.

Matters assigned by Secretary after public notice and matters referred under section 7174 of this title

(e) In addition to the other provisions of this section, the Commission shall have jurisdiction over any other matter which the Secretary may assign to the Commission after public notice, or which are required to be referred to the Commission pursuant to section 7174 of this title.

Limitation

(f) No function described in this section which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.

Final agency action

(g) The decision of the Commission involving any function within its jurisdiction, other than action by it on a matter referred to it pursuant to section 7174 of this title, shall be final agency action within the meaning of section 704 of Title 5, and shall not be subject to further review by the Secretary or any officer or employee of the Department.

Rules, regulations, and statements of policy

(h) The Commission is authorized to prescribe rules, regulations, and statements of policy of general applicability with respect to any function under the jurisdiction of the Commission pursuant to this section.

SECTION 7173. **Initiation of rulemaking procedures before Commission**

Proposal of rules, regulations, and statements of policy of general applicability by Secretary and Commission

(A) The Secretary and the Commission are authorized to propose rules, regulations, and statements of policy of general applicability with respect to any function

within the jurisdiction of the Commission under section 7172 of this title.

Consideration and final action on proposals of Secretary

(b) The Commission shall have exclusive jurisdiction with respect to any proposal made under subsection (a) of this section, and shall consider and take final action on any proposal made by the Secretary under such subsection in an expeditious manner in accordance with such reasonable time limits as may be set by the Secretary for the completion of action by the Commission on any such proposal.

Utilization of rulemaking procedures for establishment of rates and charges under Federal Power Act and Natural Gas Act

(c) Any function described in section 7172 or this title which relates to the establishment of rates and charges under the Federal Power Act or the Natural Gas Act, may be conducted by rulemaking procedures. Except as provided in subsection (d) of this section, the procedures in such a rulemaking proceeding shall assure full consideration of the issues and an opportunity for interested persons to present their views.

Submission of written questions by interested persons

(d) With respect to any rule or regulation promulgated by the Commission to establish rates and charges for the first sale of natural gas by a producer or gatherer to a natural gas pipeline under the Natural Gas Act, the Commission may afford any interested person a reasonable opportunity to submit written questions with respect to disputed issues of fact to other interested persons participating in the rulemaking proceedings. The Commission may establish a reasonable time for both the submission of questions and responses thereto.

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SECTION 7295. Savings provisions

Orders, determinations, rules, etc., in effect prior to the effective date of this chapter

(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this chapter to the Department or the Commission after August 4, 1977, and

(2) which are in effect at the time this chapter takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, the Federal Energy Regulatory Commission, or other authorized officials, a court of competent jurisdiction, or by operation of law.

Proceedings or applications for licenses, permits, etc., pending at the effective date of this chapter; regulations

(b)(1) The provisions of this chapter shall not affect any proceedings or any application for any license, permit, certificate, or financial assistance pending at the time this chapter takes effect before any department, agency, commission, or component thereof, functions of which are transferred by this chapter; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this chapter had not been enacted; and orders issued in any

such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this chapter had not been enacted.

(2) The Secretary and the Commission are authorized to promulgate regulations providing for the orderly transfer of such proceedings to the Department or the Commission.

Suits commenced prior to effective date of this chapter

(c) Except as provided in subsection (e) of this section—

(1) the provisions of this chapter shall not affect suits commenced prior to the date this chapter takes effect, and,

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this chapter had not been enacted.

Suits, actions, etc., commenced by or against any officer or agency or cause of action by or against any department or agency

(d) No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this chapter, shall abate by reason of the enactment of this chapter. No cause of action by or against any department or agency, functions of which are transferred by this chapter, or by or against any officer

thereof in his official capacity shall abate by reason of the enactment of this chapter.

Suits with officers, departments, or agencies as parties

(e) If, before the date on which this chapter takes effect, any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this chapter any function of such department, agency, or officer is transferred to the Secretary or any other official, then such suit shall be continued with the Secretary or other official, as the case may be, substituted.

Supreme Court, U. S.
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No. 78-352

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAMS PIPE LINE COMPANY and
EXPLORER PIPELINE COMPANY, PETITIONERS
v.
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinions and orders of the Interstate Commerce Commission[1] are reported at 351 I.C.C. 102

[1]As of October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91, 91 Stat. 565 (to be codified as 42 U.S.C. 7101 *et seq.*), and Executive Order No. 12009, 42 Fed. Reg. 46267 (1977), the Federal Energy Regulatory Commission, an independent regulatory commission within the Department of Energy, succeeded "to all functions and authority of the Interstate Commerce Commission * * * where the regulatory function establishes rates or charges for the transportation of oil by pipeline or establishes the valuation of any such pipeline." Pub. L. No. 95-91, Section 402(b), 91 Stat. 584. Other functions of the Interstate Commerce Commission "relat[ing] to transportation of oil by pipeline" were transferred to the Secretary of Energy. Pub. L. No. 95-91, Section 306, 91 Stat. 581.

(Pet. App. B) and 355 I.C.C. 479 (Pet. App. C); the ICC's initial decision (Pet. App. D) is not reported.

JURISDICTION

The judgment of the court of appeals was entered June 27, 1978, and its order denying a petition for rehearing was issued July 25, 1978. The petition for a writ of certiorari was filed on August 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Section 705 of the Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91, 91 Stat. 606, provides:

SAVINGS PROVISIONS

(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Department or the Commission after the date of enactment of this Act, and

(2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, the Federal Energy Regulatory Commission, or other authorized officials, a court of competent jurisdiction, or by operation of law.

(b)(1) The provisions of this Act shall not affect any proceedings or any application for any license, permit, certificate, or financial assistance pending at the time this Act takes effect before any department, agency, commission, or component thereof, functions of which are transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Secretary and the Commission are authorized to promulgate regulations providing for the orderly transfer of such proceedings to the Department or the Commission.

(c) Except as provided in subsection (e)—

(1) The provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and,

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in his official capacity shall abate by reason of the enactment of this Act.

(e) If, before the date on which this Act takes effect, any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this Act any function of such department, agency, of officer is transferred to the Secretary or any other official, then such suit shall be continued with the Secretary or other official, as the case may be, substituted.

QUESTION PRESENTED

Whether the court of appeals properly remanded a decision of the Interstate Commerce Commission approving certain increased oil pipeline rates, which the court found was not supported by rational explanations of the ICC's treatment of the pipeline's rate base, rate of return, and depreciation charges, for reconsideration by the ICC's successor, the Federal Energy Regulatory Commission.

STATEMENT

In late 1971 and early 1972, Williams,[2] an oil pipeline in the Midwest regulated as a common carrier under Section 1(1)(b) of the Interstate Commerce Act, 49 U.S.C. 1(1)(b),

[2]At the time of these filings, Williams was known as Williams Brothers Pipe Line Company; its name was subsequently changed to Williams Pipe Line Company (see Pet. App. C-2 n.3). We use the name "Williams" to refer to both entities.

filed increased transportation rates with the Interstate Commerce Commission (Pet. App. A-4). At the same time, Williams and Explorer Pipeline Company filed initial "joint rates for through service from the Gulf Coast to the Midwest" (*ibid.*). A group of oil producers and refiners in the Great Plains area, who used the Williams' pipeline system to reach the Midwest, protested the rates and requested that they be suspended (*id.* at A-4 to A-5).[3] The ICC declined to suspend the rates, but ordered an investigation into the lawfulness of both Williams' rates and the Williams-Explorer joint rates (*id.* at A-5).

Following hearings and the submission of briefs, the administrative law judge issued an initial decision approving the published rates (Pet. App. D-3 to D-35). A three-commissioner division (Division 2) of the ICC affirmed, with one commissioner dissenting (Pet. App. B-1 to B-53). Then the full Commission, with one commissioner dissenting, affirmed the findings of the initial decision and those of Division 2 (Pet. App. C-1 to C-43).[4] In reaching its decisions, the ICC relied on its earlier decisions, dating from the 1940's,[5] to support its continued reliance on a valuation rate base[6] and a 10%

[3]The shippers also filed a complaint seeking reparations back to August 20, 1970 (Pet. App. D-5 to D-6).

[4]Two commissioners did not participate (Pet. App. C-34).

[5]*Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944); *Petroleum Rail Shippers' Ass'n* v. *Alton & So. R.R.*, 243 I.C.C. 589 (1941); *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940), reopened, 272 I.C.C. 375 (1948).

[6]The court of appeals defined this term as follows (Pet. App. A-5 n.3):

> A valuation rate base allows the carriers to receive a return on the present "fair value" of all of its property devoted to public use. The Interstate Commerce Act, as amended by the Valuation Act, 37 Stat. 701 (1913), gives the ICC broad authority to "investigate, ascertain, and report the value of all property

return on valuation to determine that Williams' rates were just and reasonable (Pet. App. B-7 to B-11; Pet. App. C-4, C-6 to C-9, C-11 to C-13, C-18 to C-19; Pet. App. D-25 to D-29). In addition, the Commission permitted Williams to base its depreciation charges on its purchase price ($287.4 million) for an existing pipeline system on which ratepayers had already been charged approximately $91 million in depreciation (Pet. App. B-35 to B-36; Pet. App. C-14 to C-15).

After the petition for review was filed in the court of appeals, but before the ICC's brief was filed, jurisdiction over the regulation of oil pipelines was transferred from the ICC to the Federal Energy Regulatory Commission (FERC) and the Secretary of Energy pursuant to Sections 306 and 402(b) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 581, 584 (see note 1, *supra*, and Pet. App. A-3). The FERC then moved for remand of the case, but the court of appeals denied the motion pending its review of the merits (see Pet. App. A-3).

After briefing and oral argument, the court of appeals concluded that the ICC precedents from the 1940's provided little guidance for oil pipeline ratemaking (Pet. App. A-10). The court observed that those cases had apparently relied, without analysis, on the ICC's contemporary precedents concerning ratemaking for railroads (*id.* at A-11). The court noted (*ibid.*) that after the ICC had adopted the fair value method of ratemaking in oil pipeline cases, the Supreme Court, which had earlier

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owned or used by" regulated carriers, 49 U.S.C. § 19[a](a), based, *inter alia*, on "the original cost to date [of public assets], the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any." *Id.* § 19a(b).

appeared to mandate the fair value method in railroad ratemaking, had become "openly critical" of that method in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The court pointed out the economic conditions affecting oil pipelines had changed dramatically since the 1940's (Pet. App. A-12 to A-14). Finally, the court noted that, under Section 402(b) of the DOE Act, 91 Stat. 584, the regulatory jurisdiction over oil pipelines had been transferred to the FERC, which, joined by the Antitrust Division of the Department of Justice, asked the court to remand the case (Pet. App. A-15 to A-16 & n.22).

Turning to the ICC's opinion in this case, the court found that the Commission's decisions in the 1940's and its history of using the valuation method were insufficient to justify resurrection of a method of ratemaking last considered 30 years ago in far different economic circumstances (*id.* at A-19 to A-20). The court found (*id.* at A-21) that although the ICC urged that the fair value method was necessary in an inflationary period, it had failed to consider changed economic conditions or "to assess the actual effects of inflation on Williams' ability to attract capital."

The court found that the ICC had likewise provided no rationale for adopting the same standard of a 10% return on valuation that it had applied 30 years before (*id.* at A-22). The court concluded that without an assessment of the significance of intervening economic and technological changes this aspect of the ICC's order also lacked a rational basis (Pet. App. A-22 & n.31).

Finally, the court determined (*id.* at A-23 to A-24) that the ICC had failed adequately to explain why depreciation charges should be based on the recent acquisition price of a pipeline. The ICC had stated only that such an approach accorded with its accounting rules, and that the original cost approach urged by the protestants did not keep pace with inflation (*id.* at A-23). The court noted that the Commission had previously denied that its

ratemaking practice would be controlled by its accounting procedures (*id.* at A-23 to A-24). The court further observed that reliance on recent purchase prices can result in abrupt changes in depreciation charges solely because of the fortuity of an intervening purchase, and that adjusting depreciation for inflation, after also including an inflation factor in the valuation rate base, "would seem precipitous and itself unduly inflationary" (*id.* at A-24).

Notwithstanding these deficiencies, the court recognized that it should affirm the ICC if the "end result" of its decision was proper (*id.* at A-25). The court concluded, however, that it could not find that the end result here was proper since the agency's decision did not provide a sensible explanation of how to determine the reasonableness of rates, nor did the record contain the findings that this Court held in *FPC* v. *Hope Natural Gas Co.*, *supra,* are required for an adequate basis for determining reasonableness (*id.* at A-25 and A-18 n.27). The court therefore concluded that the case should be remanded to the FERC, the successor to the ICC, for reconsideration of the reasonableness of Williams' rates under the statutory standard (*id.* at A-25 to A-26). In view of this decision, the court concluded that it was "constrained not to decide" at this time whether the Williams-Explorer joint rates created undue preferences and prejudices, inasmuch as the nature of those questions might change as a result of the proceedings and decision of the FERC on remand (*id.* at A-27 to A-28).[7]

[7]The court rejected petitioners' argument that the division of the joint rates between the two pipelines created an illegal discrimination under Section 2 of the Interstate Commerce Act, 49 U.S.C. 2, finding that the issue had not been properly raised before the ICC (Pet. App. A-28 to A-31 & n.38).

ARGUMENT

Petitioners' primary contention (Pet. 12-16) is that the court of appeals ignored the directive in Section 705 of the DOE Act, 91 Stat. 606, that the transfer of jurisdiction over oil pipeline rates to the FERC should work no substantive changes. Petitioners argue (Pet. 15-17) that the court improperly remanded the case for the FERC's reconsideration without regard for the merits of the ICC's decision.

To the contrary, the court's opinion demonstrates its careful review of the ICC's decision. The court denied the FERC's motion "to have the case *automatically* remanded to it, following the transfer of authority from the ICC," because it recognized the effect of Section 705 of the DOE Act and petitioners' "interest in the opportunity to defend the agency's original determination" (Pet. App. A-15 to A-16 & n.22; emphasis in original). The court decided to remand the case only after petitioners had "had the opportunity to defend the agency's decision before us * * * and where that defense has not removed" deficiencies in the agency's decision (*id.* at A-16 n.22).

The court found that the ICC's orders could not be sustained because they relied without explanation on outmoded and insufficient precedents governing the method of ratemaking,[8] on out-dated economic and technological

[8]The court concluded that even assuming "that valuation ratemaking might be capable of producing a viable 'end result,' there is no assurance in the Commission's 1940's precedents—born as they were of peculiar post-depression, World War II, and post-War economic conditions—that such a result will occur in the 1970's" (*id.* at A-19 to A-20). The court found that the ICC had failed to consider changes in economic conditions (*id.* at A-20) or "to assess the actual effects of inflation on Williams' ability to attract capital" (*id.* at A-21). It also noted that the ICC had abandoned valuation ratemaking for railroads, "which [are] equally subject to the Valuation Act" (*id.* at A-20 and see *id.* at A-12 n.9). And the court expressed concern

assumptions governing rate of return,[9] and on anomalous criteria governing depreciation.[10] The court also found that "the record appears to be incomplete in certain significant respects" (Pet. App. A-25).

Despite petitioners' contentions to the contrary, the court of appeals recognized, and adhered to, the limited scope of judicial review in rate cases. See Pet. App. A-25,

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that the ICC had failed to explain its reliance on its accounting rules beyond its comment that the rules were "geared to the use of a valuation rate base" (*id.* at A-19); as the court pointed out, "there is no assurance of record, at least, that reasonable accounting measures translate automatically into reasonable rates" (*id.* at A-20).

[9]The court found "the ICC's discussion of rate of return equally problematical" because "the *total* emphasis is on the 1940's precedents" (*id.* at A-22; emphasis in original). Holding that "a 'reasonable rate of return' determination must be the product of the economic moment," the court found that the ICC had failed to explain how the "complex of relevant factors [relied on in the 1940's cases] has changed in thirty years," and that it had not explained its conclusion in the light of current conditions (*id.* at A-22 & n.31).

[10]The court found that the ICC had sought to support its decision to allow Williams' depreciation charges to be based on the purchase price of the pipeline only by referring to its accounting rules and the inability of the original cost approach suggested by the shippers "to keep pace with inflated property values" (*id.* at A-23 to A-24). The court rejected "the ICC's current unexplained insistence on irrevocably hitching its ratemaking theory to its accounting rules * * * because, when it wrote those rules, the Commission expressly denied them any such controlling impact on rates" (*ibid.*). The court also expressed concern that this practice allowed depreciation charges "to change dramatically" because of a change in ownership "even though the cost of the carriers' public service has not actually changed," and that the practice might entail allowing for inflation more than once (*id.* at A-24).

citing, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 766-767 (1968). Since the ICC's orders were unsupported by its rationale, or by usable material in the public record (Pet. App. A-25), the court correctly remanded the case to the FERC, the ICC's successor, for reconsideration. See, *e.g.*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974).

This decision was in no way inconsistent with Section 705 of the DOE Act, 91 Stat. 606, which saves from abatement pending proceedings that are affected by jurisdictional transfers from one agency to another. Nothing in that provision reduces the authority of courts reviewing pre-DOE Act decisions to dispose of such cases on their merits and to remand them when appropriate.[11] To the contrary, Section 705(c)(2) requires disposition "in the same manner and effect as if this Act had not been enacted." Since the court's decision to remand was based on its review of the merits, that decision was properly entered as though the Act "had not been enacted."[12]

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[11]Petitioners assert (Pet. 15) that the court of appeals believed "that the transfer of jurisdiction out of the ICC in some way barred the Court from affirming that agency's regulatory approach." The portion of the opinion (Pet. App. A-16) that petitioners cite, however, merely observes that in view of the transfer of the ICC's authority to the FERC, this case could not be viewed as part of the ICC's continuing effort to develop its approach to oil pipeline rates. The court pointed out that the transfer "removes the stabilizing influence of the courts' usual desire to afford an administrative agency some latitude over time to develop its own approach to [its] regulatory tasks" (*ibid.*).

[12]Nothing in the legislative history petitioners cite (Pet. 12-16) supports a contrary view. Two of the committee reports petitioners quote (Pet. 13) simply restate the language of Section 705 and indicate that pending judicial proceedings shall continue to a decision on the merits, with the appropriate successor agency substituted. The quotations from the third committee report and from the colloquy between Senators Hansen and Ribicoff (Pet. 13-15) address only the general need for continuity in the transfer of oil pipeline regulatory functions to the FERC, and suggest no changes in what would

Petitioners also urge (Pet. 17-20) that the court's decision limits or otherwise constrains the authority of regulatory agencies to determine whether to establish ratemaking standards by adjudicatory or rulemaking proceedings.[13] But the court expressly recognized the Commission's "discretion to choose between adjudicatory or quasi-legislative means of adopting a new methodology for the future" (Pet. App. A-21 n.28). As the court pointed out, the shippers had challenged Williams' rates as unreasonable, and "section [1(5)(a)] of the Interstate Commerce Act states that no unreasonable rate may stand" (*ibid.*). Accordingly, the court was obliged to review the ICC's orders and determine whether its ratemaking was rational (*ibid.*).[14]

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otherwise be the disposition of pending judicial proceedings. See 123 Cong. Rec. S13282-S13283 (daily ed. Aug. 2, 1977).

[13]Petitioners contend (Pet. 18) that the court's opinion has a "forward-looking thrust" because it points out that Williams' reliance on the valuation methodology might require that relief be prospective only. Petitioners seek to find in this analysis implicit support for the ICC's decision to apply valuation methodology. What the court indicated, however, was simply that the FERC could, on remand, decline to order reparations because of this reliance, and thus "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939); accord, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 311 (1974); *Natural Gas Pipeline Company of America* v. *FPC*, 128 F. 2d 481, 485-486 (7th Cir. 1942).

[14]Contrary to petitioners' assertion (Pet. 21), the issue before the court of appeals was not "the lawfulness of the ICC's *pro tempore* use of [the valuation] standard under the circumstances of this case" (*ibid.*), but the lawfulness of Williams' rates (Pet. App. A-5, A-21 n.28, A-31). The inquiry into the lawfulness of Williams' rates necessarily entailed an inquiry into the validity of the valuation standard, because that is the standard the ICC used to determine the reasonableness of the rates (*id.* at A-18 & n.27). See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548-549 (1978); *FPC* v. *Texaco Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78 - 352

WILLIAMS PIPE LINE COMPANY AND
EXPLORER PIPELINE COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
FARMERS UNION CENTRAL EXCHANGE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF IN OPPOSITION FOR FARMERS UNION CENTRAL EXCHANGE, ET AL.

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BRIEF IN OPPOSITION FOR FARMERS UNION CENTRAL EXCHANGE, ET AL.

OPINIONS BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit in the proceeding styled *Farmers Union Central Exchange v. Federal Energy Regulatory Commission and the United States of America*, (No. 76-2138) was entered on June 27, 1978. That decision remanded to the Federal Energy Regulatory Commission (F.E.R.C.) the decisions by the Interstate Commerce Commission (I.C.C.)

in *Petroleum Products. Williams Brothers Pipe Line Co.*, 351 I.C.C. 102 (1975), and 355 I.C.C. 479 (1976).

JURISDICTION

The jurisdictional requisites are set forth in the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the review by the Court of Appeals of the decisions of the Interstate Commerce Commission finding certain oil pipeline rates to be reasonable was conducted in accordance with the principles governing judicial review of actions of an administrative agency.

2. Whether any provision of the Department of Energy Organization Act precluded judicial review and consequent remand by the Court of Appeals.

STATEMENT OF THE CASE

The facts of the case are set forth in the opinion of the Court of Appeals.[1]

ARGUMENT

The petitioning pipelines have presented no important questions which would require review by this Court. The Court of Appeal's review of the actions of the I.C.C. was conducted in a manner entirely consonant with the principles governing judicial review of the actions of administrative agencies. There is no important question

[1]The opinion appears at Appendix A. Appendix references (hereinafter "App.") will be to the appendices to the Petition for a Writ of Certiorari of Williams Pipe Line Company and Explorer Pipeline Company in No. 78-352.

presented with respect to the proper interpretation of the Department of Energy Organization Act to be settled by this Court.

1. Petitioners' principal basis for seeking review by this Court of the decision of the Court of Appeals is their contention that the Court exceeded its proper role in reviewing the action of an administrative agency. (Pet. pp. 17-21) Actually, the Court of Appeals conducted the "searching and careful" inquiry called for by the process of judicial review, at the conclusion of which it found that there was no rational basis for the I.C.C.'s findings on the three major issues of: (1) the appropriate rate base for Williams Pipe Line Company, (2) the proper rate of return on the base selected, and (3) the treatment of depreciation expenses. (App. A-17 to A-26) The irrationality of the I.C.C.'s findings on these issues forms an independent and proper basis under the Administrative Procedure Act (A.P.A.) for remanding the case to the appropriate administrative agency for further action.

The A.P.A., in Section 706(2),[2] provides several independent grounds for a reviewing court to set aside the action of an agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-414 (1971). An agency's action and the supporting findings may be found by the reviewing court to be arbitrary and capricious under Section 706(2)(A), even though it may find them to be supported by substantial evidence in accordance with Section 706(2)(E). *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 284 (1974). An action of an agency may be found to be arbitrary and capricious by the reviewing court when the agency fails to consider all the relevant factors and commits a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 416.

[2]5 U.S.C. §706(2).

Contrary to what the petitioning pipelines seem to suggest, there is nothing in this Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, ____ U.S. ____, 55 LEd.2d 460 (1978), which suggests that these fundamental principles have been altered. (Pet. pp. 10-11, 17-19) In *Vermont Yankee*, this Court ruled only that a reviewing court should not impose procedural requirements on an agency beyond those required by statute. 55 LEd.2d at 482. Indeeed, this Court reaffirmed the basic principles of judicial review in *Vermont Yankee* by remanding that case to the Court of Appeals to determine if the challenged action had sufficient justification in the record of the administrative proceedings. Quoting from *Camp v. Pitts*, 411 U.S. 138, 143 (1973), Mr. Justice Rehnquist said:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard for review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." 55 LEd.2d at 482-483.

The Court of Appeals' action reversing the I.C.C.'s action and remanding the case to its successor agency, F.E.R.C., was consistent with these principles of judicial review of agency action. The shipper group which sought review in the Court of Appeals argued, among other things, that the I.C.C.'s decision finding that the local rates of Williams Pipe Line Company were reasonable was not supported by the I.C.C.'s explanation of the treatment it gave to the carrier's rate base, rate of return and depreciation expenses.

First, the Court of Appeals found that the I.C.C. had not provided a rational explanation for its use of the so-called "valuation base" as the appropriate rate base for determining the reasonableness under Section 1(5)(a) of the Interstate Commerce Act of the local rates of petitioner Williams Pipe Line Company. (App. A-17 to A-22) The claim that the use of such a base was "traditional" was readily shown to be unsupported by reference to the I.C.C.'s own decisions and regulations. In addition, the contention that the use of such a rate base was responsive to inflation was found by the Court of Appeals not to be supported by the I.C.C.'s decisions under review which never considered the impact of the risk of inflation on the pipeline's ability to raise capital from investors. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 808 (1968) and *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, at 603 (1944) and App. A-21 and B-16. The Court also found that the I.C.C. failed to address at all the irrationality of the "double-counting" of inflation involved in using a valuation rate base while at the same time using a purchase price base for determining the depreciation charges portion of the pipeline's operating expenses. (App. A-21 to A-22, A-24, B-23 to B-24)

The Court of Appeals also found no rational explanation for the I.C.C.'s use of a rate of return derived *solely* from decisions it had reached in another economic era.[3] (App. A-13 to A-15, A-22)

Finally, the Court of Appeals found that the I.C.C.'s treatment of depreciation expenses lacked a rational basis. The Court found that the recognition of the purchase price of the assets as a base for determining depreciation

[3]Sometime after its decision in these cases, the I.C.C. found it necessary to recognize the risks involved in a different economic environment and departed from the rate of return adopted in its earlier decisions. See *Trans Alaska Pipeline Rate Case*, ____ U.S. ____, 56 LEd.2d 591, 597, n. 13 (1978).

charges, which recognition was purportedly in compliance with the I.C.C.'s accounting regulations, was contradicted by the I.C.C.'s very decision adopting those regulations. The Court found that the I.C.C.'s treatment not only unjustifiably increased depreciation expenses, but also withdrew any recognition of almost $100 million in already charged depreciation. (App. A-23 to A-24) Further, the "double-counting" of inflation caused by the recognition of two different bases for rate of return and depreciation was not explained by the I.C.C. (*Supra*, p. 5)

Any and all of these fundamental flaws in the I.C.C.'s decisions provided an independent basis for setting aside those decisions under Section 706(2)(A) of the A.P.A.. The Court of Appeals set aside the I.C.C.'s action because of the failure of the agency's adopted rationale to provide adequate grounds for its finding that the pipeline rates at issue were reasonable. See *Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973).

2. The petitioners also suggest that the Court of Appeals improperly interfered with the agency's decision to defer consideration of prospective changes in certain of its ratemaking criteria to a separate rulemaking case. (Pet. pp. 19-21) It should be noted that the I.C.C.'s treatment of the depreciation base, as well as other issues relating to the reasonableness of the rates at issue but not reached by the Court, (A-25, n. 33) have not been made the subject of the rulemaking proceeding.[4] As the Court of Appeals correctly recognized, the I.C.C. did reach a decision on the merits by finding in this case that the rates at issue were reasonable, rather than holding the case in abeyance.[5] (App. A-20, n.

[4]See 39 Fed. Reg. 32333 (Sept. 6, 1974) and 41 Fed. Reg. 2100 (Jan. 14, 1976).

[5]This is not to suggest that the shippers believe that the I.C.C. should have held the case in abeyance. They believe that only the most general guidelines could be adopted in the rulemaking proceeding, and any such guidelines would have limited application in a case involving a particular pipeline.

28) Faced with that fact, the Court of Appeals had no choice under the provisions of the Administrative Procedure Act and other statutes but to proceed with the review sought by the shippers on all of the issues they raised. The Act provides, in 5 U.S.C. §702, that any person aggrieved by agency action is entitled to judicial review. Such review is to be conducted in the form and manner provided by statute. See 5 U.S.C. §703 and 28 U.S.C. §§2321(a) and 2342(5). Cf. *Califano v. Sanders*, 430 U.S. 99, 104-107 (1977).

The pipelines rely on *American Commercial Lines v. Louisville and Nashville R. Co.*, 392 U.S. 571 (1968),[6] for the proposition that a deferral of certain regulatory issues to a rulemaking proceeding is appropriate. (Pet. pp. 19-21) Actually, this Court was more concerned in *Ingot Molds* with the lower court's misreading of the statute involved. 392 U.S. 584-590. There is an additional problem with the pipelines' argument. As the Court of Appeals recognized, there is little assurance that the aggrieved shippers will ever receive a disposition on the merits by the agency involved regarding the use of a valuation base as a rate base and the appropriate rate of return.[7]

3. The arguments above demonstrate that the Court of Appeals correctly concluded, in a manner consistent with the appropriate standard of review, that the I.C.C.'s decisions lacked a rational basis for several key findings. This conclusion alone supports the setting aside of those

[6]Popularly known as the *Ingot Molds* case, because of its title before the I.C.C. 326 I.C.C. 77 (1965)

[7]App. A-20, n. 28. It would be instructive for the Court to consider the fate of the rulemaking proceeding relied on in the *Ingot Molds* case as the basis for directing the lower court to allow the agency to proceed with it. After letting the rulemaking drag on for several years, the I.C.C. terminated it in October 1976 without ever reaching a decision on the issues involved. I.C.C. Docket 34013 (Sub-No. 1) *Cost Standards in Intermodal Rate Proceedings* (Order served Oct. 27, 1976).

decisions. Perhaps recognizing the firm foundation for the Court's action, the pipelines then attempt to argue that the passage of the Department of Energy Organization Act[8] precluded the remand ordered by the Court. (Pet. pp. 12-17) This argument amounts to an assertion that Congress limited the scope of judicial review, an assertion which must be supported by clear and convincing evidence. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) However, even a cursory review of the pertinent provisions of the DOE Act reveals the lack of merit in the pipelines' argument, and, in fact, shows that the Court of Appeals acted in a manner entirely consistent with the legislation.

Section 705(c),[9] which petitioners rely on, provides, with regard to suits commenced prior to the effective date of the DOE Act, that:

> ". . . proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this chapter had not been enacted."

There is nothing in this language which precludes judicial review. The language is clear, and says only that a court should conduct its review as if the I.C.C. still had jurisdiction. Since the Court of Appeals found that the I.C.C.'s decisions lacked a rational basis, it was free to set them aside.

Moreover, there is clear and convincing evidence that Congress intended to permit judicial review to go forward. Section 705(a) of the DOE Act provides:

> All orders . . .
>
> (1) which have been issued, made, granted, or allowed to become effective by . . . any Federal department or agency . . . in the performance of functions which are transferred under this Act to

[8]Pub. L. 95-91, 91 Stat. 565 (Aug. 4, 1977), 42 U.S.C. §7101, *et seq.*
[9]42 U.S.C. §7295(c).

> the Department or the Commission after the date of enactment of this Act, and
>
> (2) which are in effect at the time this Act takes effect,
>
> shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by . . . *a court of competent jurisdiction* . . .[10]

Petitioners' citation of the legislative history in support of their argument that the Court of Appeals' decision was contrary to the DOE Act is both inappropriate and totally unconvincing. It is a well established principle that legislative history should not be examined unless and until it is determined that a statute has no plain meaning.[11] As already discussed, there is no ambiguity in Section 705; consequently, consideration of the legislative history is unnecessary.

Even if a review of the legislative history is undertaken, a reading of those portions cited by the pipelines does not support their position. For example, the Conference Committee Report[12] mainly relied upon by the petitioners offers no support for their argument since judicial review of final agency action always offers the possibility of a remand.

[10]42 U.S.C. §7295(a), emphasis added. See App. SA-32.
[11]*Tennessee Valley Authority v. Hill*, ____ U.S. ____, 57 LEd.2d 117, 140, n. 29 (1978)
[12]Sen. Rep. No. 95-367, 95th Cong., 1st Sess., Conf. Report to Accompany S. 826, July 27, 1977, at p. 79. It provides:

> "Judicial review of final agency action taken by the Commission of proceedings now under way which are transferred from the ICC, as well as new proceedings initiated by the Commission, will continue to be made in the same manner as if the functions had been retained in the ICC."

Having concluded that there was no rational basis for the I.C.C.'s findings on three major issues in the case, the Court of Appeals issued a remand order. Due to the transfer of jurisdiction under the DOE Act, the remand had to be directed to the new jurisdictional agency, F.E.R.C., rather than the I.C.C. Had it not been for the passage of the new legislation, the remand would have been directed to the I.C.C.

In support of their contention that the remand was a retroactive imposition of F.E.R.C. jurisdiction, the pipelines claim that the Court of Appeals relied on that agency's "clean slate request" in granting the remand. (Pet. p. 15) That claim is unwarranted and directly contradicted by a fair reading of the decision which demonstrates that the Court painstakingly reviewed the decisions relied upon by the I.C.C., as well as the rationale of the decisions under review. (App. A-10 to A-28)[13]

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

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[13]Further proof that the appeals court had not "relied" upon the "clean slate request" can be found in its discussion of the reason for rejecting an earlier F.E.R.C. request to have the case automatically remanded following the transfer of authority to it. (App. A-16, n. 22)